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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of Queen's Bench.

WITH TABLES OF THE NAMES OF THE CASES ARGUED
AND CITED, AND THE PRINCIPAL MATTERS.

BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

ESQRS. BARRISTERS AT LAW.

VOL. XI.

CONTAINING THE CASES OF MICHAELMAS, HILARY, AND
EASTER TERMS AND VACATIONS, 1839-40.

IN THE SECOND AND THIRD YEARS OF VICTORIA.

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J U D G E S
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL.
Sir ROBERT MONSEY ROLFE, Knt.



A

TABLE

OF

THE NAMES OF CASES

REPORTED IN THIS VOLUME.

A		Page		Page
			Bosanquet v. Ransford	520
ALDERSON, Regina v.	3		Bristol and Exeter Railway Company, Regina v., note	
Allan v. Gomme	759	(a)		202
Alway, Charlton v.	993	Broadbent v. Ledward		209
Arlecdon, Inhabitants of, Regina v.	87	Brooks, Haigh v. (10 A. & E., 321.)		809
Arthur, Bryan v.	108	Brownlow, Regina v.		119
Atkins v. Kilby	777	Bruce v. Willis		463
		Bryan v. Arthur		108
		Burslem, Inhabitants of, Regina v.		52
		Butterfield, Friend v.		838
		Byrom v. Thompson		31
			C	
Baldrey, Head v.	906	Cadby, v. Martinez		720
Bamford, Doe dem. Cuthbert v.	786	Carmarthen, Mayor &c., Regina v.		9
—— v. Shuttleworth	926	Carpenter v. Wall		803
Barton, doe dem. Higginbotham v.	307	Carrington, Heisch v., note (c)		555
——, Inhabitants of, Regina v.	343	Chadwick, Magor v.		571
Baylis v. Lawrence	920	Chapman, Lane v.		966
Beale, Skeate v.	983	—— v. ——		980
Bedfordshire, Justices of, Regina v.	134	——, Merry v. (10 A. & E. 524.)		209
Belcher, Benjamin v.	350			
Benjamin v. Belcher	350			
Bolton, doe dem. Noble v.	183			
			A 3	Chapman,

TABLE OF CASES REPORTED.

vii

Gomme, Allan v.	Page 759	J	
Grand Junction Railway Company, Regina v., note (a)	128	James v. Phelps	Page 483
Griffin v. Ellis	743	Johnston v. Osborne	549
—, Empson v.	186	Jones v. Thomas	193
Griffits v. Ivery	322	— v. Williams	175
— v. Payne	131	— v. —	643
Growcock v. Waller	165		
Gwilt, Regina v.	587	K	
		Kalloway, Short v.	28
H		Keats, Dubois v.	329
Hadley, Cole v.	807	Kenyon, Eastwood v.	438
Haigh v. Brooks (10 A. & E., 321)	809	Key, Scales v.	819
—, Howden v.	1033	Kightley, Watson v.	702
Hansard, Stockdale v.	253. 297	Kilby, Atkins v.	777
Harman, Hartley v.	798		
Harris, Regina v.	518	L	
Hartley v. Harman	798	Lamb, Sharpe v.	805
— v. Wharton	934	Lancashire, Justices of, Regina v.	144
Hatch v. Traves	702	Lancaster Canal Company, Parnaby v.	223
Hawdon, Regina v.	143	— v. —	230
Head v. Baldrey	906	Lane, Chapman v.	980
Hedges, Regina v.	163	— v. —	966
Heisch v. Carrington, note (e)	555	Lainson, Drew v.	529
Hodsoll v. Stallebrass	301	Latch v. Wedlake	959
—, v. Wise	816	Lawrence, Baylis v.	920
Holding, Davis v.	710	—, Padmore v.	380
Holdsworth v. Mayor &c. of Dartmouth	490	— v. Wilcock	941
Holmes v. Newlands	44	Ledward, Broadbent	09
Hornidge v. Wilson	645	Leeds and Liverpool Canal Company, Regina v.	316
Hounsfield, Drury v.	101	—, Mayor &c. of, Regina v.	512
— v. —	98	Loder, Trueman v.	9
How, Regina v.	159	Lydeard, St. Lawrence, Inhabitants, Regina v.	616
Howden v. Haigh	1033	Lyons v. De Pass	326
Humble v. Mitchell	205		
		A 4	M'Gowan,
I			
Iles, Dolby v.	335		
Isles, Ellis v.	665		
Ivery, Griffiths v.	322		

		Page
M		
	Page	
M'Gowan, Regina v.	869	
Maddy, Regina v.	878	
Magor v. Chadwick	571	
Mahon, Ferguson v.	179	
Manley, Wood v.	34	
Martinez v. Cadby	720	
May, Robins v.	213	
Meigh v. Clinton	418	
Memoranda	1. 757	
Merry v. Chapman (10 A. & E. 526.)	209	
Middlesex, Justices of, Regina v.	809	
Mitchell v. Ede	888	
——, Humble v.	205	
——, Parker v.	788	
Monkman v. Shepperdson	411	
N		
Nesbit v. Rishton	244	
Newbury, Mayor &c. of, Regina v. (10 A. & E., 386.)	826	
Newlands, Holmes v.	44	
Newman, Tucker v.	40	
Nornabell, Ramsey v.	383	
North Midland Railway Company, Regina v.	955	
P		
Padmore v. Lawrence	380	
Parker v. Mitchell	788	
Parnaby, Lancaster Canal Company v.	230	
—— v. ———	223	
Payn, Regina v.	955	
Payne, Griffiths v.	131	
Permewen, Doe dem. Tremewen v.	431	
Pett, Doe dem. Blight v.	842	
Phelps, James v.	483	
Phillips, Doe dem. Phillips v.		796
Poor Law Commissioners, Allstonfield Incorporation, Regina v.		558
Potter, Regina v.		3
Price, Regina v.		727
Q		
Quayle, Regina v.		508
R		
Ramsey v. Nornabell		383
Ransford, Bosanquet v.		520
Regina v. Alderson		3
—— v. Arlecdon, Inhabitants of		87
—— v. Barton, Inhabitants of		343
—— v. Bedfordshire, Justices of		134
—— v. Bristol and Exeter Railway Company, note (a)		202
—— v. Brownlow		119
—— v. Burslem, Inhabitants of		52
—— v. Carmarthen, Mayor &c.		9
—— v. Cheshire, Justices of		139
—— v. Clint, Inhabitants of, note (b)		624
—— v. Crease		677
—— v. Dudley		875
—— v. Ecclesall Bierlow, Inhabitants of		607
—— v. Fordham, Inhabitants of		73
—— v. Gamble		69
—— v. Grand Junction Railway Company, note (a)		128
—— v. Goddard		3
—— v. Gwilt		587
		Regina

ix

	Page		Page
Regina v. Harris	518	Regina v. Warwick, Corpora-	
— v. Hawdon	143	tion of (10 A. & E. 386)	757
— v. Hedges	163	— v. Whitley Upper,	
— v. How	159	Inhabitants of	90
— v. Lancashire, Jus-		— v. Worcestershire,	
tices of	144	Justices of	57
— v. Leeds and Liver-		Regula Generalis	2. 602. 868*
pool Canal Company	316	Richmond, Faith v.	339
— v. — Mayor &c.,		Rishton, Nesbit v.	244
of	512	Roberts, Doe dem. Booley v.	1000
— v. Lydeard, St. Law-		Robins v. May	213
rence, Inhabitants of	616	Roderick, Sibbald v.	38
— v. M'Gowan	869	Roe, Doe dem. Mullarky v.	333
— v. Maddy	878	Ross v. Clifton	631
— v. Middlesex, Jus-			
tices of	809		
— v. Newbury, Mayor			
&c. of (10 A. & E. 386)	826		
— v. North Midland			
Railway Company	955		
— v. Payn	955		
— v. Poor Law Com-			
missioners, Allstonfield			
Incorporation	558		
— v. Potter	3		
— v. Price	727		
— v. Quayle	508		
— v. St. Lawrence, Lud-			
low, Inhabitants of	170		
— v. St. Pancras, Ves-			
trymen of	15		
— v. Sheffield Railway			
Company	194		
— v. Slatter	505		
— v. Stanley	882		
— v. Sussex, Justices of			
(10 A. & E. 682.)	343		
— v. Swansea, Mayor			
&c.	66		
— v. Taylor	949		
— v. Tetbury, note (a)	615		
— v. Thorogood (12 A.			
& E.)	1026		
— v. Wainfleet, All			
Saints, Inhabitants of	656		

TABLE OF CASES REPORTED.

	Page		Page
Swansea, Mayor &c., Regina v.	66	Wall, Carpenter v.	803
		Waller, Growcock v.	165
T		Walmesley v. Cooper	216
Taylor, Regina v.	949	Warwick, Corporation of,	
Tetbury, Regina v., note (a)	615	Regina v. (10 A. & E. 386)	757
Thomas, Flight v.	688	Watson v. Kightley	702
———, Jones v.	193	Wedlake, Latch v.	959
Thompson, Byrom v.	31	Wharton, Hartley v.	934
———, Sheerman v.	1027	Whitley Upper, Inhabitants	
Thorogood, Regina v. (12 A. & E.)	1026	of, Regina v.	90
Thurman v. Wild	453	Wilcock, Lawrence v.	941
Trayes, Hatch v.	702	Wild, Thurman v.	453
Trueman v. Loder	589	Williams, Jones v.	175
Tucker v. Newman	40	——— v. ——	643
		Willis, Bruce v.	463
U		Wilson, Hornidge v.	645
Unwin, Christie v.	373	Wintle v. Freeman	539
Usborne, Johnston v.	549	Wise v. Hodsoll	816
		Wood v. Manley	34
		Woodland v. Fuller	859
		Worcestershire, Justices of,	
		Regina v.	57
		Y	
		Yorke v. Chapman	813
W			
Wainfleet, All Saints, In-			
habitants of, Regina v.	656		

TABLE OF CASES CITED.

A				Page
Ackland v. Lutley	-	-	9 <i>A. & E.</i> 879.	- 192
Adams v. Wordley	-	-	{ 1 <i>M. & W.</i> 374. <i>S. C. Tyr. & G.</i>	
			620.	- 601
Addison v. Overend	-	-	6 <i>T. R.</i> 766.	- 210
Adeane v. Mortlock	-	-	5 <i>New Ca.</i> 236.	- 791
Alchin v. Wells	-	-	5 <i>T. R.</i> 470.	- 827
Alexander v. Bonnin	-	-	4 <i>New Ca.</i> 799.	- 476
— Ex parte	-	-	<i>Mont. Ca. Bank.</i> 14 note.	- 354
Allan v. Gomme	-	-	11 <i>A. & E.</i> 760.	- 673
Allen v. Pink	-	-	4 <i>M. & W.</i> 140.	- 946
Allnutt v. Inglis	-	-	12 <i>East.</i> 527.	- 252
Angle v. Alexander	-	-	7 <i>Bing.</i> 119.	- 187
Anonymous	-	-	1 <i>Broun. & G.</i> 4.	- 409
—	-	-	<i>Dyer.</i> 304. a.	- 408
—	-	-	<i>Hard.</i> 485. -	- 704
—	-	-	<i>Lofft.</i> 453. -	- 827
—	-	-	<i>Moore.</i> 59, 60.	- 850
Archer's Case	-	-	1 <i>Rep.</i> 66 b.	- 435
Arkwright v. Gell	-	-	5 <i>M. & W.</i> 203.	- 574
Armstrong v. Lewis	-	-	2 <i>C. & M.</i> 274.	- 1013
Ashley v. Killick	-	-	5 <i>M. & W.</i> 509.	- 1030
Astley v. Reynolds	-	-	2 <i>Stra.</i> 915.	- 987
Atkins v. Hill	-	-	<i>Cowp.</i> 284.	- 445
Atlee v. Backhouse	-	-	3 <i>M. & W.</i> 635.	- 987
Attorney-General v. Aspinall	-	-	2 <i>Myl. & Cr.</i> 613.	- 499
— v. Norwich, Mayor of	-	-	2 <i>Myl. & Cr.</i> 406.	- 497
— v. Vigor	-	-	8 <i>Ves.</i> 256.	- 1020
Ayrey v. Fearnside	-	-	4 <i>M. & W.</i> 168.	- 215

B

Backwell's Case	-	-	1 <i>Vern.</i> 152.	- 232
Baggeley v. Nicholls	-	-	11 <i>A. & E.</i> 566. note (c)	- 366
Bailey v. Appleyard	-	-	8 <i>A. & E.</i> 161.	697. 790
Baker v. Brown	-	-	2 <i>M. & W.</i> 199.	- 185
Balcetti v. Serani	-	-	1 <i>Peake's N. P. C.</i> 192. (3d ed.)	- 135
Ballard v. Dyson	-	-	1 <i>Taunt.</i> 279.	- 770
Balston v. Bensted	-	-	1 <i>Camp.</i> 463.	- 574
Bank of Scotland v. Watson	-	-	1 <i>Dow.</i> 40.	- 595

			Page
Barber v. Backhouse -	-	1 <i>Peake's N. P. C.</i> 61.	1028
—— v. Fox -	-	2 <i>Wms. Saund.</i> 137 c.	858
—— v. Gingell -	-	3 <i>Esp.</i> 60.	133
Barker v. Greenwood -	-	4 <i>M. & W.</i> 421.	190
Barnes v. Hedley -	-	2 <i>Taunt.</i> 184.	448
Barrow v. Coles -	-	3 <i>Camp.</i> 92.	897
Bartlett v. Pentland -	-	1 <i>B. & Ad.</i> 704.	522
Barton v. Hunter -	-	{ <i>Hudson & Brooke's K. B. & Ex.</i> <i>Ch. Rep. (Ireland)</i> 569.	523
Bass v. Clive -	-	4 <i>M. & S.</i> 13.	962
Bateman v. Elman -	-	<i>Cro. Eliz.</i> 866.	210
Bates v. Wells -	-	1 <i>Stark Ev.</i> 363. note (g) 2d ed.	938
Baway v. Lowdall -	-	<i>Style</i> , 249. 273.	434
Baxter v. Taylor -	-	4 <i>B. & Ad.</i> 72.	43
Bayly v. Bunning -	-	1 <i>Lev.</i> 173.	865
Bealey v. Shaw -	-	6 <i>East</i> , 208.	574
Beaseley v. Clarke -	-	2 <i>New Ca.</i> 705.	579
Becquet v. McCarthy -	-	2 <i>B. & Ald.</i> 951.	181
Beeching, Ex parte -	-	4 <i>B. & C.</i> 136.	279
Beeston v. Collyer -	-	4 <i>Bing.</i> 309.	801
Berwick v. Andrews -	-	2 <i>Ld. Raym.</i> 971.	834
Beverley v. Lincoln Gas and Coke Com- pany -	-	6 <i>A. & E.</i> 829.	708
Bird v. Gammon -	-	5 <i>New Ca.</i> 883.	936
Bishop v. Young -	-	2 <i>B. & P.</i> 78.	704
Blachford v. Dod -	-	2 <i>B. & Ad.</i> 179.	485
Blackett v. Royal Exchange Assurance Com- pany -	-	2 <i>Cr. & J.</i> 244. <i>S. C. Tyrwh.</i> 266.	601
Blake v. Pilford -	-	1 <i>Moo. & Rob.</i> 198.	381
Blakemore v. Glamorganshire Canal Navi- gation -	-	1 <i>Myl. & Keen</i> , 154.	233
—— v. ——— -	-	5 <i>Y. & J.</i> 60.	233
Bligh v. Brent -	-	2 <i>Y. & Coll.</i> 268.	206
Bohtlingk v. Inglis -	-	3 <i>East</i> , 381.	899
Bold v. Rayner -	-	{ 1 <i>M. & W.</i> 343. <i>S. C. Tyr. & Gr.</i> 820.	555
Bolitho, Ex parte -	-	<i>Buck. Ca. B.</i> 100.	595
Bolton v. Canham -	-	<i>Polluxf.</i> 125. 131.	651
Bond v. Downton -	-	2 <i>A. & E.</i> 26.	672
Borthwick v. Carruthers -	-	1 <i>T. R.</i> 648.	936
Bosanquet v. Ransford -	-	11 <i>A. & E.</i> 526. note	526
Boulton v. Canon -	-	1 <i>Freem. K. B. & C. P.</i> 537.	653
—— v. Crowther -	-	2 <i>B. & C.</i> 703.	235
Bowyer v. Bampton -	-	2 <i>Stra.</i> 1155.	974
Bracebridge v. Cook -	-	<i>Plowd.</i> 418.	846
Bradley v. Holdsworth -	-	3 <i>M. & W.</i> 422.	206
—— v. Wyndham -	-	1 <i>Wils.</i> 44.	542
Brandlyn v. Örd -	-	1 <i>Atk.</i> 571.	850
Brandt v. Bowlby -	-	2 <i>B. & Ad.</i> 952.	897
Brass Crosby's Case -	-	2 <i>W. Bl.</i> 754. <i>S. C. 3 Wils.</i> 188.	282
Brettell v. Wilmot -	-	2 <i>Phill. Eccl. Rep. temp. Lec.</i> 548.	757
Brickell v. Hulse -	-	7 <i>A. & E.</i> 454.	808
Bridges v. Blanchard -	-	1 <i>A. & E.</i> 536.	36
Bridgman v. Holt -	-	<i>Shower's Par. Ca.</i> 122.	1015
Bright v. Walker -	-	{ 1 <i>C. M. & R.</i> 211. <i>S. C. 4 Tyr.</i> 502.	579. 692
Bristol Poor, Governors of, v. Wait -	-	1 <i>A. & E.</i> 264.	40. 80. 996

TABLE OF CASES CITED.

xiii

			Page
Brittain v. Kinnaird	-	- 1 <i>Brod. & B.</i> 432.	- 392
Brogden v. Marriott	-	- 2 <i>New Ca.</i> 473.	- 456
Broggref v. Hawke	-	- { 3 <i>New Ca.</i> 880. 5 <i>Scott</i> , 148. <i>S.</i> C. 6 <i>Dowl. P. C.</i> 67.	- 945
Bromage v. Prosser	-	- 4 <i>B. & C.</i> 247.	- 381
Bromfield v. Crowder	-	- 1 <i>New Rep.</i> 313.	- 437
Brooks v. Haigh	-	- 10 <i>A. & E.</i> 523.	- 989
Broseley, Ex parte	-	- 7 <i>A. & E.</i> 423.	- 95
Brown v. Best	-	- 1 <i>Wils.</i> 174.	- 577
——, Ex parte	-	- 2 <i>Ves. Jun.</i> 67.	- 354
Brown v. Jarvis	-	- { 1 <i>M. & W.</i> 704. <i>S. C. Tyr. & G.</i> 1033.	- 546
—— and Munton, Ex parte	-	- 1 <i>Ves. & B.</i> 60.	- 354
Browne v. London	-	- 1 <i>Mod.</i> 285. 1 <i>Vent.</i> 152.	- 704
Bruce v. Wait	-	- 1 <i>Mann. & Gr.</i> 1.	- 183
Buchanan v. Rucker	-	- 1 <i>Camp.</i> 65. <i>S. C. 9 East</i> , 192.	- 181
Buckeridge v. Ingram	-	- 2 <i>Ves. Jun.</i> 651. 654. &c.	- 464
Buckley v. Pirk	-	- 1 <i>Salk.</i> 516.	- 651
Bunting v. Lepingwell	-	- 4 <i>Rep.</i> 29 a.	- 749
Burbridge, Ex parte	-	- 1 <i>Deacon B. C.</i> 131.	- 208
Burder v. Veley	-	- <i>H. Vac.</i> 1840.	- 748
Burdett v. Abbott	-	- 14 <i>East</i> , 1.	- 279
—— v. ——	-	- 5 <i>Dow.</i> 165.	- 282
Burrough v. Skinner	-	- 5 <i>Burr.</i> 2639.	- 931
Bush v. Steinman	-	- 1 <i>B. & P.</i> 404.	- 234
Bushell's Case	-	- <i>Vaugh.</i> 135. 137.	- 284
Butler and Baker's Case	-	- 3 <i>Rep.</i> 26 b. 27 a.	- 846
—— v. Hobson	-	- 4 <i>New Ca.</i> 290. 5 <i>New Ca.</i> 128.	- 354
Buttemere v. Hayes	-	- 5 <i>M. & W.</i> 456.	- 441
Butts v. Bilke	-	- { 4 <i>Price</i> , 240. <i>S. C. 2 Rose</i> , 171 note.	- 354
Byerley v. Windus	-	- 5 <i>B. & C.</i> 1.	- 752

C

Cabell v. Vaughan	-	- 1 <i>Wms. Saund.</i> 291. b.	- 962
Cadaval, Duke de, v. Collins	-	- 4 <i>A. & E.</i> 859.	- 990
Campbell v. Hodgson	-	- <i>Gow.</i> 74.	- 595
Campbell v. Maund	-	- 5 <i>A. & E.</i> 865.	- 26
Cane v. Chapman	-	- 5 <i>A. & E.</i> 647.	- 238
Carew v. Edwards	-	- 4 <i>B. & Ad.</i> 351.	- 357
Carruthers, Ex parte	-	- 2 <i>Man. & R.</i> 397.	- 130
Castling v. Aubert	-	- 2 <i>East</i> , 325.	- 442
Cast Plate Manufacturers, Governor of, v. Meredith	-	- { 4 <i>T. R.</i> 794.	- 235
Cavan v. Stewart	-	- 1 <i>Stark. N. P. C.</i> 525.	- 181
Cave v. Mountain	-	- 1 <i>Man. & Gr.</i> 257.	- 612
Chambers, In re	-	- 3 <i>Mont. & Ayr.</i> 294.	- 354
Champion v. Plummer	-	- 1 <i>N. R.</i> 252.	- 595
Chanter v. Glubb	-	- 9 <i>B. & C.</i> 479.	- 685
Chapman v. Prickett	-	- 6 <i>Bing.</i> 602.	- 1005
Cheetham v. Ward	-	- 1 <i>B. & C.</i> 630.	- 220
Chesterton v. Farlar	-	- 7 <i>A. & E.</i> 713.	- 751
Church v. Imperial Gas and Coke Company	-	- { 6 <i>A. & E.</i> 846.	- 708
Clarke v. King	-	- 2 <i>Car. & P.</i> 286.	- 933

				Page
Clerk v. Blackstock	-	-	<i>Holt's N. P. C.</i> 474.	- 33
— v. Withers	-	-	2 <i>Ld. Raym.</i> 1072.	- 535
Clerke v. Pywell	-	-	1 <i>Wms. Saund.</i> 319.	- 854
Cloves v. Williams	-	-	5 <i>Scott</i> , 68. <i>S. C.</i> 3 <i>New Ca.</i> 868.	- 708
Coates v. Lord Hawarden	-	-	7 <i>B. & C.</i> 588.	- 259
Cocker v. Crompton	-	-	1 <i>B. & C.</i> 489.	- 668
Cohen v. Morgan	-	-	6 <i>D. & R.</i> 8.	- 487
Colchester, Mayor, &c., v. Lowten	-	-	1 <i>Ves. & B.</i> 226.	- 496
Colyer v. Speer	-	-	2 <i>B. & B.</i> 67.	- 545
Compton v. Taylor	-	-	4 <i>M. & W.</i> 158.	- 705
Cooper v. Chitty	-	-	1 <i>Burr.</i> 20.	- 833
— v. Marten	-	-	4 <i>East</i> , 76.	- 448
Cornish v. Rowley	-	-	1 <i>Schw. N. P.</i> 178.	- 933
Coryton v. Lithebye	-	-	2 <i>Wms. Saund.</i> 117. <i>c. note</i> (2.)	- 210
Cotton v. Browne	-	-	3 <i>A. & E.</i> 312.	100. 240
Cotton's Case	-	-	<i>Cro. Eliz.</i> 758.	- 127
Cowling v. Higginson	-	-	2 <i>M. & W.</i> 245.	- 771
Cox v. Prentice	-	-	3 <i>M. & S.</i> 344.	- 929
Coxe v. Harden	-	-	4 <i>East</i> , 211.	- 896
Crease v. Barrett	-	-	1 <i>C. M. & R.</i> 919. <i>S. C.</i> 5 <i>Tyr.</i> 458.	615. 679
— v. Sawle	-	-	<i>Still depending</i>	- 685
Cresswell v. Crisp	-	-	2 <i>C. & M.</i> 634.	- 706
— v. Wood	-	-	10 <i>A. & E.</i> 460.	- 442
Crew, Ex parte	-	-	16 <i>Ves.</i> 236.	- 354
Crogate's Case	-	-	8 <i>Rep.</i> 66 <i>b.</i>	- 391
Cross v. Law	-	-	6 <i>M. & W.</i> 217.	- 528
— v. Lewis	-	-	2 <i>B. & C.</i> 686.	- 578
Crozer v. Pilling	-	-	4 <i>B. & C.</i> 26.	100. 103. 831
Cursham v. Newland	-	-	4 <i>M. & W.</i> 101.	- 434
Curtis v. Davenant	-	-	2 <i>Mod.</i> 8. <i>Ed.</i> 1757	- 752
Custodes, &c. v. Inhabitants of Outwell	-	-	<i>Style</i> , 178. 184.	- 394
Cuthbert v. Haley	-	-	8 <i>T. R.</i> 390.	- 971

D

Dale v. Birch	-	-	3 <i>Camp.</i> 347.	- 262
Dangerfield v. Thomas	-	-	9 <i>A. & E.</i> 292.	- 555
Darnel, Sir Thomas, Case	-	-	3 <i>How. St. Tr.</i> 1.	- 281
Darnell v. Williams	-	-	2 <i>Stark.</i> 166.	- 1028
Davis v. Hardy	-	-	6 <i>B. & C.</i> 225.	- 485
— v. Holding	-	-	1 <i>M. & W.</i> 159. <i>S. C.</i> <i>Tyr. & Gr.</i> 371.	- 713
Davison v. Franklin	-	-	1 <i>B. & Ad.</i> 143.	- 970
Day v. Robinson	-	-	1 <i>A. & E.</i> 554.	- 187
Dean v. Newhall	-	-	8 <i>T. R.</i> 168.	- 219
Delany v. Jones	-	-	4 <i>Esp.</i> 191.	- 382
Delegal v. Highley	-	-	3 <i>New Ca.</i> 950.	- 489
Denne v. Knott	-	-	7 <i>M. & W.</i> 143.	- 1032
Denny v. Trapnell	-	-	2 <i>Wils.</i> 578.	- 201
De Rutzen v. Farr	-	-	4 <i>A. & E.</i> 55.	615. 1033
Dew v. Clark	-	-	1 <i>Add. Ec. Rep.</i> 279.	- 754
Dick v. Lumsden	-	-	1 <i>Peake N. P. C.</i> 189.	- 897
Dickinson v. Hatfield	-	-	1 <i>Moo. & R.</i> 141.	- 936
— v. Lilwall	-	-	4 <i>Camp.</i> 279.	555. 600
Dodson v. Mackey	-	-	8 <i>A. & E.</i> 225. <i>note</i> (b)	- 956

TABLE OF CASES CITED.

xv

		Page
Doe v. Lynes	- 3 B. & C. 388.	- 854
Doe dem. Cox v. —	- 4 Esp. 185.	- 723
Earl Falmouth v. Alderson	- { 1 M. & W. 210. S.C. Tyr. & Gr. 543.	- 685
Leicester v. Biggs	- 2 Taunt. 109.	- 190
Willis v. Birchmore	- 9 A. & E. 662.	- 312
Hellings v. Bird	- 11 East, 49.	- 1015
Wright v. Child	- 1 New R. 335.	- 1003
Bath v. Clarke	- 3 New Ca. 429.	- 787
Taylor v. Crisp	- 8 A. & E. 779.	- 851
White v. Cuff	- 1 Campb. 173.	- 1015
Lord Huntingtower v. Culliford	- 4 D. & R. 248.	- 723
Duncan v. Edwards	- 9 A. & E. 554.	- 731
Linsey v. —	- 5 A. & E. 95.	- 795
Marriott v. —	- 5 B. & Ad. 1065.	- 312
Poole v. Errington	- 1 A. & E. 750.	- 849
Evans v. Evans	- 9 A. & E. 719.	- 1003
Cadogan v. Ewart	- 7 A. & E. 636.	- 192, 487
Cooper v. Finch	- 4 B. & Ad. 283.	- 849
Clarges v. Forster	- 13 East, 405.	- 724
Gallini v. Gallini	- 5 B. & Ad. 621. 640.	- 434
Penwarden v. Gilbert	- 2 Br. & B. 58. 98.	- 1005
Strong v. Goff	- 11 East, 668.	- 434
Hickman v. Haslewood	- 6 A. & E. 167. 175.	- 1005
Souter v. Hull	- 2 Dow. & R. 38.	- 1020
Bedford v. Kightley	- 7 T. R. 63.	- 722
Eyre v. Lambly	- 2 Esp. 635.	- 724
Spicer v. Lea	- 11 East, 312.	- 722
Douglas v. Lock	- 2 A. & E. 705.	- 40 6
Maddock v. Lynes	- 3 B. & C. 388.	- 847
Bullen v. Mills	- 2 A. & E. 17.	- 312
Knight v. Nepean	- 5 B. & Ad. 86.	- 698
Perry v. Newton	- 5 A. & E. 514.	- 324
Player v. Nicholls	- 1 B. & C. 356.	- 190
Brierly v. Palmer	- 16 East, 53.	- 725
Burrell v. Perkins	- 3 M. & S. 271.	- 1023
Church v. —	- 3 T. R. 749.	- 1013
Wright v. Plumptre	- 3 B. & Ald. 474.	- 849
Fishar v. Prosser	- 1 Cowp. 217.	- 850, 1014
Shaw v. Roe	- 13 Price, 260.	- 335
Candler v. Smith	- 7 T. R. 531.	- 434
Williams v. —	- 5 A. & E. 350.	- 725
Wright v. —	- 8 A. & E. 255.	- 793
Knight v. Smythe, Lady	- 4 M. & S. 347.	- 312
Mudd v. Suckermore	- 5 A. & E. 703.	- 324
Norris v. Tucker	- 3 B. & Ad. 473.	- 1005
Dolley v. Ward	- 9 A. & E. 583.	- 437
Jones v. Williams	- 5 A. & E. 291.	- 311, 1016
Earl Shrewsbury v. Wilson	- 5 B. & Ald. 363.	- 406
Child v. Wright	- 8 T. R. 64.	- 1003
Matthewson v. Wrightman	- 4 Esp. 5.	- 723
Domett v. Beckford	- 5 B. & Ad. 521.	- 595
Douglas v. Forrest	- 4 Bing. 686.	- 181
Dowland v. Slade	- 5 East, 272. 290.	- 246
Drewe v. Lainson	- 11 A. & E. 529.	- 542, 827
Dring v. Respass	- 1 Lev. 193.	- 391
Dubber v. Trollop	- Ca. K. B. T. Hardw. 160.	- 434

	Page
Dubois v. Keats - - -	8 <i>A. & E.</i> 945. note (a) - 329
Dunnage v. Kemble - - -	5 <i>New Ca.</i> 538. - 193
Durrant v. Boys - - -	6 <i>T. R.</i> 580. - 40, 998

E

Eardley v. Law - - -	<i>Mich. T.</i> 1840. - 529
Earl v. Hinton - - -	2 <i>Stra.</i> 732. - 973
Eastwood v. Kenyon - - -	11 <i>A. & E.</i> 438. - 415
Edden v. Read - - -	3 <i>Campb.</i> 338. - 930
Eddington v. Borman - - -	4 <i>T. R.</i> 4. - 996
Eddowes v. Hopkins - - -	1 <i>Doug.</i> 376. - 187
Edgcombe v. Rodd - - -	5 <i>East.</i> 294. - 458
Edge v. Shaw - - -	2 <i>C. M. & R.</i> 415. <i>S. C. Tyrwh.</i> 1127. - 948
Edmunds v. Downes - - -	2 <i>C. & M.</i> 459. 463. <i>S. C. 4 Tyr.</i> 175. 179. - 940
Edwards v. Buchanan - - -	5 <i>B. & Ad.</i> 788. - 526
—— v. Dick - - -	4 <i>B. & Ald.</i> 212. - 79, 970
—— v. Hodding - - -	5 <i>Taunt.</i> 815. - 929
—— v. Weeks - - -	2 <i>Mod.</i> 259. - 413
Eldridge v. Knott - - -	<i>Cowp.</i> 214. - 576
Elliott v. Davis - - -	2 <i>B. & P.</i> 538. - 962
Ellis v. Mason - - -	7 <i>Dowl. P. C.</i> 598. - 215
—— v. Warnes - - -	<i>Moore.</i> 752. <i>S. C. Cro. Jac.</i> 52. - 972
Ellison v. Isles - - -	11 <i>A. & E.</i> 673. - 770
Elaton v. Braddick - - -	2 <i>Cro. & M.</i> 435. <i>S. C. 4 Tyr.</i> 122. - 555
Ely, case of the Isle of - - -	10 <i>Rep.</i> 141 a. - 393
Emly v. Lye - - -	15 <i>East.</i> 7. - 595
Emmerson v. Saltmarsh - - -	7 <i>A. & E.</i> 266. - 396
Erving v. Peters - - -	3 <i>T. R.</i> 685. - 973
Evans v. Cramlington - - -	<i>Carth.</i> 5. - 663
Evans v. Elliot - - -	9 <i>A. & E.</i> 342. - 508
—— v. Williams - - -	1 <i>C. & M.</i> 30. - 1030
Ex parte, — Gent. - - -	4 <i>A. & E.</i> 576. note (a) - 588
Eyston v. Studd - - -	<i>Plowd.</i> 459, 464. - 694

F

Fawcett v. Fowlis - - -	7 <i>B. & C.</i> 394. - 392
Fenner v. Fisher - - -	<i>Poph.</i> 1. <i>S. C. Cro. Eliz.</i> 288. - 48
Fenton v. Forster - - -	5 <i>Dy.</i> 307 b. - 848
Ferguson v. Mahon - - -	9 <i>A. & E.</i> 245. - 184
Fermer's Case - - -	3 <i>Rep.</i> 77 a. - 846
Ferrer's Case - - -	6 <i>Rep.</i> 7 a. - 246
Fielder v. Ray - - -	6 <i>Bing.</i> 332. - 793
Finden v. Westlake - - -	<i>Moo. & M.</i> 461. - 581
Fisher v. Clement - - -	10 <i>B. & C.</i> 472. - 924
—— v. Thames Junction Railway Com- pany - - -	5 <i>Dowl. P. C.</i> 773. - 634
Fitchet v. Adams - - -	2 <i>Stra.</i> 1128. - 850
Fletcher v. Dyche - - -	2 <i>T. R.</i> 32. - 962
Flight v. Thomas - - -	11 <i>A. & E.</i> 688. - 791
Flower v. Adam - - -	2 <i>Taunt.</i> 314. - 234

TABLE OF CASES CITED.

xvii

	Page
Foord v. Wilson - - -	{ 8 Taunt. 543. S. C. 2 B. Moore, 592. - 30
Foster v. Jolly - - -	{ 1 C. M. & R. 703. S. C. 5 Tyrwh. 239. - 601
Fowler v. Coster - - -	- 10 B. & C. 427. - 354
—— v. Down - - -	- 1 B. & P. 44. - 355
—— v. Homer - - -	- 3 Camp. 294. - 381
Fox v. Clifton - - -	- 6 Bing. 776. 9 Bing. 115. 424. 962
Foxley's Case - - -	- 5 Rep. 110. b. - 125
Freestone v. Crouch - - -	- Cro. Eliz. 492. - 671
Fulmerston v. Steward - - -	- Plowd. 102. 109. - 694
Furze v. Sharwood - - -	- June 1838. - 595

G

Gardner v. Moulst - - -	- 10 A. & E. 464. - 808
Gare v. Gapper - - -	- 3 East, 472. - 755
Garnett v. Ferrand - - -	- 6 B. & C. 611. - 392
George v. Stanley - - -	- 4 Taunt. 685. - 970
Gibbs v. Stead - - -	- 8 B. & C. 528. - 997
Gibson v. Hunter - - -	- 2 H. Bl. 288. - 133
—— v. Minet - - -	- 1 H. Bl. 569. 602. - 707
Giles v. Grover - - -	- 9 Bing. 128. - 544. 865
Gillon v. Boddington - - -	- Ry. & M. 161. - 306
Glanville's Case - - -	- Moore, 838. - 293
Gledstane v. Hewitt - - -	- 1 C. & J. 565. - 210
Godson v. Sanctuary - - -	- 4 B. & Ad. 255. - 553
Goodright dem. Drewry v. Barron - - -	- 11 East, 220. - 1004
—— Fowler v. Forrester - - -	- 8 East, 552. S. C. 1 Taunt. 578. 1020
—— Parson v. Herring - - -	- 4 Doug. 298. - 434
Goodtitle dem. Sweet v. Herring - - -	- 1 East, 264. - 434
Gould v. Gapper - - -	- 5 East, 545. - 755
—— v. Lasbury - - -	{ 1 C. M. & R. 254. S. C. 4 Tyrwh. 863. - 817
Graham v. Grill - - -	- 2 M. & S. 294. - 828
Gray v. Gutteridge - - -	- 3 Car. & P. 40. - 929
Green v. Bicknell - - -	- 8 A. & E. 701. - 946
—— v. Cresswell - - -	- 10 A. & E. 453. - 442
Greene v. Jones - - -	- 1 Wms. Saund. 299. - 667. 817
Griffith v. Williams - - -	- 1 C. & J. 47. - 324
Groenvelt v. Burwell - - -	- 1 Ld. Ray. 454. 467. - 391
Grymes v. Blofield - - -	- Cro. Eliz. 541. - 459
Guinness v. Carroll - - -	- 1 B. & Ad. 459. - 181
Guthrie v. Boucher - - -	- 8 Sim. 248. - 358

H

Haigh v. Brooks - - -	- 10 A. & E. 315, 316. - 445. 858. 989
Haille v. Smith - - -	- 1 B. & P. 563. - 895
Haine v. Davy - - -	- 4 A. & E. 892. - 636. 644
Haire v. Wilson - - -	- 9 B. & C. 643. - 923
Hall v. Franklin - - -	- 3 M. & W. 259. - 208
—— v. Maule - - -	- 7 A. & E. 721. - 751
Hallifax v. Chambers - - -	- 4 M. & W. 662. - 535

	Page
Hambleton v. Vere	- 2 <i>Saund.</i> 169. - 303
Hamlet v. Richardson	- 9 <i>Bing.</i> 644. - 988
Harbert's Case	- 3 <i>Rep.</i> 11 b. 13 b. - 694
Harcourt v. Fox	- 1 <i>Show.</i> 506. - 172
Harding v. Gardner	- 1 <i>Br. & B.</i> 72. - 1002
Hargrave's Case	- 5 <i>Rep.</i> 31 a. - 653
Harlow v. Bradnox	- 2 <i>Lev.</i> 88. - 409
Harrington v. Hoggart	- 1 <i>B. & Ad.</i> 577. - 931
Harris v. Baker	- 4 <i>M. & S.</i> 27. - 229
—— v. Loyd	- 5 <i>M. & W.</i> 432. - 864
—— v. Saunders	- 4 <i>B. & C.</i> 411. - 181
—— v. Watson	- <i>Peake N. P. C.</i> 72. - 858
Harvey Ex parte	- 7 <i>A. & E.</i> 739. <i>S. C. 3 N. & P.</i> 159. - 15
Harwood v. Law	- 7 <i>M. & W.</i> 203. - 528
Hawes v. Forster	- 1 <i>Moo. & R.</i> 368. - 595
Hawkes v. Saunders	- 1 <i>Cowp.</i> 289. - 936
Hawkshaw v. Rawlings	- 1 <i>Stra.</i> 25. - 460
Hawley Ex parte, In re Richards	- 2 <i>Mont. & Ayr.</i> 426. - 357
Haydon v. Williams	- 7 <i>Bing.</i> 163. - 935
Head v. Baldrey	- 6 <i>A. & E.</i> 459. 8 <i>A. & E.</i> 605. - 908
Heidon v. Smethwick	- <i>Gouldsb.</i> 90. pl. 1. - 247
Heisch v. Carrington	- 5 <i>C. & P.</i> 471. - 555
Helsby v. Mears	- 5 <i>B. & C.</i> 504. - 962
Hemming v. Trenery	- 9 <i>A. & E.</i> 926. - 33
Hetley v. Boyer	- <i>Cro. Jac.</i> 356. <i>S. C. 2 Bulst.</i> 197. - 393
Heydon v. Ibgrave	- <i>Gouldsb.</i> 23. pl. 2. - 247
Heynsworth v. Bird	- <i>Trials per Pais</i> , 529. 8th ed. - 770
Hickman v. Colley	- 2 <i>Stra.</i> 1120. - 524
Hillman v. Uncles	- <i>Skinner</i> , 391. - 460
Hinde v. Gray	- 1 <i>Man. & Gr.</i> 201. note a. - 412
—— v. Hunter	- <i>cit.</i> 1 <i>B. & Ad.</i> 710. - 524
Hitchcock v. Coker	- 6 <i>A. & E.</i> 438. 456. - 992
—— v. Way	- 6 <i>A. & E.</i> 943. - 976
Hitchman v. Walton	- 4 <i>M. & W.</i> 409. - 314
Hobhouse's Case	- { 3 <i>B. & Ald.</i> 420. <i>S. C. 2 Chitt. Rep.</i> 207. - 279
Hodgson v. Davies	- 3 <i>Camp.</i> 530. - 599
Hogan v. Jackson	- 1 <i>Cowp.</i> 299. - 1002
Holford v. Copeland	- 3 <i>B. & P.</i> 129. - 63
Holliday v. Camsell	- 1 <i>T. R.</i> 658. - 211
Hollis v. Goldfinch	- 1 <i>B. & C.</i> 205. - 478
Holloway v.	- 3 <i>Keb.</i> 151. - 410
Home v. Earl Camden	- 2 <i>H. Bl.</i> 533. - 753
Horn v. Chandler	- 1 <i>Mod.</i> 271. - 304
Hornblower v. Prowd	- 2 <i>B. & Ald.</i> 327. - 207
Horne Ex parte	- 7 <i>B. & C.</i> 632. - 206
Hounsfield v. Drury	- 11 <i>A. & E.</i> 98. - 103
Howell v. King	- 1 <i>Mod.</i> 190. - 673. 770
Hubert v. Groves	- 1 <i>Exp.</i> 148. - 238
Hughes v. Hughes	- { 2 <i>C. M. & R.</i> 663. <i>S. C. 1 Tyrwh.</i> & <i>G.</i> 4. - 193
Hull v. Blake	- 4 <i>Taunt.</i> 572. - 246
Hulm v. Heyloek	- <i>Cro. Car.</i> 200. - 855
Hunt v. Bate	- <i>Dyer</i> , 272 (a). - 452
Hurrell v. Wink	- 8 <i>Taunt.</i> 369. - 39
Hutchins v. Chambers	- 1 <i>Burr.</i> 587. - 40. 998
Hutchinson v. Johnston	- 1 <i>T. R.</i> 729. - 553. 542

TABLE OF CASES CITED.

xix

			Page
Hutton v. Eyre	-	- 6 Taunt. 289.	- 219
—— v. Warren	-	- { 1 M. & W. 466. S. C. Tyrwh. & Gr. 646.	- 555

I

Ibberson v. Dicas	-	- Mont. Ca. Bank. 254. note (a).	- 357
Inglis v. Usherwood	-	- 1 East, 515.	- 899
Isle of Ely Case	-	- 10 Rep. 141 a.	- 393

J

Jackson v. Peaked	-	- 1 M. & S. 234.	- 44
—— v. Stacey	-	- Holt's N. P. C. 455.	- 771
Jacquet v. Bower	-	- { 7 Dowl. P. C. 331. S. C. 5 M. & W. 155.	- 947
James v. Phelps	-	- 11 A. & E. 483.	- 383
Jay and Topham's Case	-	- 12 How. St. Tr. 821.	- 288
Jeffrey's Case	-	- 5 Rep. 66 b.	- 748
Jenkins v. Harvey	-	- { 1 C. M. & R. 877. 2 C. M. & R. 393. S. C. 5 Tyr. 32 b. 871.	- 578
Jesson v. Doe dem. Wright	-	- 2 Bligh, 1. 57.	- 434
Jevens v. Harridge	-	- 1 Wms. Saund. 1 n. (1.)	- 652
Johnston v. Usborne	-	- 11 A. & E. 549.	- 601
Johnstone v. Hudlestone	-	- 4 B. & C. 922.	- 721
Jones v. Ashburnham	-	- 4 East, 455.	- 988
—— v. Atherton	-	- 7 Taunt. 56.	- 533. 544
—— v. Bird	-	- 5 B. & Ald. 837.	- 235
—— v. Flint	-	- 10 A. & E. 753.	- 441
—— v. Jones	-	- 6 M. & W. 84.	- 709
—— v. Littledale	-	- 6 A. & E. 486.	- 557. 595
—— v. Price	-	- 3 New Ca. 52.	- 697
—— v. Roe dem. Perry	-	- 3 T. R. 88.	- 1020
—— v. Waite	-	- 5 New Ca. 341.	- 858

K

Keightley v. Birch	-	- 3 Camp. 521.	- 542
Kempland v. Maccauley	-	- 1 Peake, N. P. C. 95. 3d ed.	- 542
Kemshead Ex parte	-	- 1 Rose's Ca. Bank, 149.	- 834
Kennett v. Milbank	-	- 8 Bing. 38. S. C. 1 Mo. & Sc. 102.	- 936
Kershaw v. Cox	-	- 3 Esp. N. P. C. 246.	- 33
Kettle v. Bromsall	-	- Willes, 118.	- 210
Kine v. Sewell	-	- 3 M. & W. 297.	- 381
King v. Melling	-	- 1 Vent. 214. 225. S. C. 2 Lev. 58.	- 434
Knibbs v. Hall	-	- 1 Esp. 84.	- 988
Knight v. Clements	-	- 8 A. & E. 215.	- 33
—— v. Hunt	-	- 5 Bing. 432.	- 1036
Knill v. Williams	-	- 10 East, 431.	- 32

	L	Page
Lacy v. Kinaston	- { 1 <i>Ld. Raym.</i> 688. <i>S. C.</i> 2 <i>Salk.</i> 575. 3 <i>Salk.</i> 298. -	- 219
Lampleigh v. Brathwait	- <i>Hob.</i> 105. -	- 452
Lanchester v. Frewer	- 2 <i>Bing.</i> 361. -	- 752
—— v. Thompson	- 5 <i>Mad.</i> 4. -	- 754
Lane v. Alexander	- <i>Cro. Jac.</i> 202. -	- 457
—— v. Crockett	- 7 <i>Price.</i> 566. -	- 545
—— Ex parte, In re Fowler	- <i>Mont. Ca. Bank.</i> 12. -	- 554
Lawe v. King	- 1 <i>Wms. Saund.</i> 81. <i>a. note</i> (3) 676. 817	- 817
Lawton v. Ward	- { 1 <i>Ld. Ray.</i> 75. <i>S. C.</i> 1 <i>Lut.</i> 111. -	- 673. 770
Lay v. Lawson	- 4 <i>A. & E.</i> 795. -	- 382
Leach v. Thomas	- 2 <i>M. & W.</i> 427. -	- 187
Leader v. Moxton	- 3 <i>Wils.</i> 461. -	- 235
Lechmere v. Fletcher	- { 1 <i>C. & M.</i> 623. <i>S. C.</i> 3 <i>Tyrwh.</i> 450. -	- 936
Lee v. Milner	- 2 <i>M. & W.</i> 824. -	- 204. 233. 422
—— v. Muggeridge	- 5 <i>Taunt.</i> 36. -	- 443
Lees, Ex parte	- 16 <i>Ves.</i> 472. -	- 354
Legge v. Boyd	- 1 <i>Dowl. P. C.</i> 39. -	- 637
Leicester v. Rose	- 4 <i>East.</i> 372. -	- 1036
Leman v. Goulty	- 3 <i>T. R.</i> 3. -	- 755
Lempriere v. Humphrey	- 3 <i>A. & E.</i> 181. -	- 668
L'Evesque de Worcester's Case	- <i>Moore.</i> 36. <i>S. C. Poph.</i> 84. -	- 327
Lewis v. Alcock	- 3 <i>M. & W.</i> 188. -	- 544
—— v. Peake	- 7 <i>Taunt.</i> 153. -	- 31
Liggins v. Inge	- 7 <i>Bing.</i> 682. -	- 36
Lindon v. Hooper	- 1 <i>Coup.</i> 414. -	- 987
Littlefield v. Shee	- 2 <i>B. & Ad.</i> 811. -	- 415. 445
London and Brighton Railway Company v. Wilson	- { 6 <i>New. Ca.</i> 135. -	- 425
—— and Greenwich Railway Company, In re	- { 2 <i>A. & E.</i> 678. -	- 203
Longridge v. Derville	- 5 <i>B. & Ald.</i> 117. -	- 989
Lowe v. Paramour	- <i>Dyer.</i> 301. <i>a.</i> -	- 249
Lowndes v. Bray	- { 1 <i>Sugd. Vend. & Purch.</i> 377. 10th ed. -	- 933
Loyd v. Lee	- 1 <i>Str.</i> 94. -	- 447
Lucas v. De la Cour	- 1 <i>M. & S.</i> 249. -	- 962
—— v. Nockells	- 10 <i>Bing.</i> 157. -	- 535
Luttrell's Case	- 4 <i>Rep.</i> 86 <i>a.</i> -	- 773
Lyons v. Cohen	- 3 <i>Dowl. P. C.</i> 242. -	- 706

M

M'Carthy v. Colvin	- 9 <i>A. & E.</i> 607. -	- 932
M'Donald v. Rooke	- 2 <i>New Ca.</i> 217. -	- 485
Magee v. Atkinson	- 2 <i>M. & W.</i> 440. -	- 554. 595
Malachy v. Soper	- 3 <i>New Ca.</i> 371. -	- 304
Maltravers v. Powell	- <i>Dyer.</i> 245 <i>a. pl.</i> 64. -	- 694
Manchester, Earl, v. Vale	- 1 <i>Saund.</i> 23 <i>a.</i> -	- 817
Manfield v. Dugard	- 1 <i>Eq. Ca. A. b.</i> 195. -	- 437
Margetts v. Bays	- 4 <i>A. & E.</i> 489. -	- 81

TABLE OF CASES CITED.

xxi

			Page
Market Overt Case	-	5 <i>Rep.</i> 83 <i>b.</i>	- 327
Marsh v. Wood	-	9 <i>B. & C.</i> 659.	- 834
Marshall v. Lynn	-	6 <i>M. & W.</i> 109.	- 427
— v. Pitman	-	9 <i>Bing.</i> 595.	40. 996
Marshalsea Case	-	10 <i>Rep.</i> 68 <i>b.</i> 76 <i>a.</i>	- 392
Martin, Ex parte	-	15 <i>Ves.</i> 114.	- 354
— v. Francis	-	2 <i>B. & Ald.</i> 402.	- 831
— v. Nicholls	-	3 <i>Sim.</i> 458.	- 181
— v. O'Hara	-	2 <i>Cowp.</i> 823.	- 353
— v. Strong	-	5 <i>A. & E.</i> 535.	- 381
Mason v. Hill	-	3 <i>B. & Ad.</i> 304.	5 <i>B. & Ad.</i> 1. - 574
— v. Rumsey	-	1 <i>Campb.</i> 385.	- 595
Matthews v. West London Water Works Company	-	3 <i>Camp.</i> 405.	- 237
Meigh v. Clinton	-	11 <i>A. & E.</i> 418.	- 963
Mellor v. Walker	-	2 <i>Wms. Saund.</i> 5 <i>b.</i>	- 676
Meres v. Ansell	-	3 <i>Wils.</i> 275.	553. 601
Middlesex, Sheriff's Case	-	11 <i>A. & E.</i> 273.	- 269
Mills v. Graham	-	1 <i>New Rep.</i> 140.	- 210
Milward v. Caffin	-	2 <i>W. Bl.</i> 1330.	40. 996
Mitchinson v. Hewson	-	7 <i>T. R.</i> 348.	- 451
Mitton's Case	-	4 <i>Rep.</i> 32 <i>b.</i>	- 154
—	-	1 <i>Mod.</i> 285.	- 704
Monmouth Canal Company v. Harford	-	1 <i>C. M. & R.</i> 614.	<i>S. C.</i> 5 <i>Tyr.</i> - 579
Mood v. Mayor of London	-	2 <i>Salk.</i> 683.	- 210
Moore v. Boulcott	-	1 <i>New Ca.</i> 323.	- 456
— v. Bowmaker	-	7 <i>Taunt.</i> 97.	- 973
Morant v. Sign	-	2 <i>M. & W.</i> 95.	- 535
Morgans v. Bridges	-	2 <i>B. & Ald.</i> 647.	- 976
Morland v. Pellatt	-	8 <i>B. & C.</i> 722.	- 555
Moseley v. Hanford	-	10 <i>B. & C.</i> 729.	- 601
Moses v. Macferlan	-	<i>Burr.</i> 1005. 1009.	- 973
Mullett v. Hutchison	-	7 <i>B. & C.</i> 639.	<i>S. C.</i> 1 <i>Mann. & R.</i> 522. - 794
Munger Hunger v. Warden	-	2 <i>Seu. Ca.</i> 40.	- 610
Murray's Case	-	1 <i>Wils.</i> 299.	- 282
Muskett v. Drummond	-	10 <i>B. & C.</i> 153.	- 375

N

Neale v. McKenzie	-	1 <i>C. M. & R.</i> 61.	<i>S. C.</i> 4 <i>Tyr.</i> - 653
— v. Wylie	-	3 <i>B. & C.</i> 535.	- 31
Neave v. Moss	-	1 <i>Bing.</i> 360.	- 310
Nelson v. Cherrrell	-	7 <i>Bing.</i> 665.	8 <i>Bing.</i> 516. - 353
Nelthorpe v. Dorrington	-	2 <i>Lev.</i> 115.	- 210
Nepean v. Doe dem. Knight	-	2 <i>M. & W.</i> 894.	698. 1025
Nesbit v. Rishton	-	9 <i>A. & E.</i> 426.	- 245
Newman v. Walters	-	3 <i>B. & P.</i> 612.	- 858
Nicholls v. Butcher	-	1 <i>Ves.</i> 195.	- 1001
Nichols v. Clent	-	3 <i>Price.</i> 547.	- 900
Nicholson v. Revill	-	4 <i>A. & E.</i> 675.	- 220
Nind v. Marshall	-	1 <i>Br. & B.</i> 319.	<i>S. C.</i> 3 <i>B. Moore,</i> 795. - 30

			O	Page
Ogle v. Atkinson	-	-	7 <i>Taunt.</i> 759.	- 895
Ord, Ex parte	-	-	1 <i>Deacon B. C.</i> 166.	- 208

P

Pagani v. Gandolfi	-	-	2 <i>Car. & P.</i> 370.	- 801
Paget v. Foley	-	-	2 <i>New Ca.</i> 679.	- 173
Parkinson v. Collier	-	-	2 <i>Park. on Ins.</i> 470.	- 601
Parmiter v. Coupland	-	-	6 <i>M. & W.</i> 105.	- 923
Partridge v. Bere	-	-	5 <i>B. & Ald.</i> 604.	- 314
—— v. Scott	-	-	3 <i>M. & W.</i> 220.	- 578
—— v. Strange	-	-	<i>Plowd.</i> 77. 88.	- 694
Patchett v. Bancroft	-	-	7 <i>T. R.</i> 367.	- 997
Paterson v. Gandasequi	-	-	15 <i>East</i> , 62.	- 595
Patton v. Randall	-	-	1 <i>Ja. & W.</i> 189.	1001
Payne v. Chute	-	-	1 <i>Roll. Rep.</i> 365.	- 834
—— v. Drewe	-	-	4 <i>East</i> , 525.	534. 865
—— v. Shedden	-	-	1 <i>Moo. & Rob.</i> 382.	698. 790
Pearce v. Morrice	-	-	2 <i>A. & E.</i> 84.	- 79
Pearson v. Garret	-	-	<i>Skin.</i> 398.	- 704
—— v. Rogers	-	-	9 <i>A. & E.</i> 503.	- 535
Pennell v. Woodburn	-	-	7 <i>C. & P.</i> 117.	- 31
Penoyer v. Brace	-	-	1 <i>Ld. Raym.</i> 244.	- 522
Penryn's Case	-	-	5 <i>Rep.</i> 85 b.	- 247
Perchard v. Heywood	-	-	8 <i>T. R.</i> 468.	- 996
Phillips v. Hopwood	-	-	1 <i>B. & Ad.</i> 619.	- 353
Philpot v. Aslett	-	-	1 <i>C. M. & R.</i> 85.	1030
Pillans v. Mierop	-	-	3 <i>Burr.</i> 1663.	- 453
Pinchon's Case	-	-	9 <i>Rep.</i> 86 b.	- 705
Pitchford v. Davis	-	-	5 <i>M. & W.</i> 2.	- 424
Platt, Lady, v. Sleep	-	-	<i>Cro. Jac.</i> 275. <i>S. C. Bulstr.</i> 118.	846
Plymouth, Countess of, v. Trogmorton	-	-	1 <i>Salk.</i> 65.	- 705
Podger's Case	-	-	9 <i>Co.</i> 105 b.	- 855
Pope v. Biggs	-	-	9 <i>B. & C.</i> 245.	- 309
Price v. Messenger	-	-	2 <i>B. & P.</i> 158.	- 784
—— v. Morgan	-	-	2 <i>M. & W.</i> 53.	- 944
Priddy v. Henbrey	-	-	1 <i>B. & C.</i> 674.	- 704
Proctor v. Johnson	-	-	1 <i>Ld. Raym.</i> 669.	- 522
Proudfoot, Ex parte	-	-	1 <i>Atk.</i> 252.	- 354
Purnell v. Young	-	-	3 <i>M. & W.</i> 288.	- 193
Pye v. Cooke	-	-	<i>Mod.</i> 864, 865.	- 212

R

Ramsbottom v. Buckhurst	-	-	2 <i>M. & S.</i> 565.	- 973
Randall v. Rigby	-	-	4 <i>M. & W.</i> 130.	- 705
Randell v. Wheble	-	-	10 <i>A. & E.</i> 719.	- 546
Rann v. Hughes	-	-	7 <i>T. R.</i> 350. <i>note (a)</i>	453. 550
Raphael v. Goodman	-	-	8 <i>A. & E.</i> 565.	- 814
Ravenga v. Mackintosh	-	-	2 <i>B. & C.</i> 693.	- 488
Rawson v. Walker	-	-	1 <i>Stark. N. P. C.</i> 361.	- 601
Rawstorne v. Wilkinson	-	-	4 <i>M. & S.</i> 256.	- 827

TABLE OF CASES CITED.

xxiii

			Page
Regina v. Alternun	-	10 A. & E. 699.	612. 622
v. Barking	-	2 Salk. 452.	- 80
v. Black Callerton	-	10 A. & E. 679.	- 613
v. Braintree Union Guardians	-	Hil. T. 1841.	- 570
v. Bridgewater	-	10 A. & E. 693.	613. 620
v. Bristol Dock Company	-	11 A. & E. note c.	- 72
v. Bristol and Exeter Railway Com- pany	-	11 A. & E. 202. note (a).	- 196
v. Clint	-	11 A. & E. 624. note b.	- 812
v. Crossley	-	10 A. & E. 132.	- 733
v. Davies	-	H. 1840.	- 953
v. Dodson	-	9 A. & E. 704.	- 487
v. Eastern Counties Railway Com- pany	-	10 A. & E. 531.	232. 428
v. Ecclesall Bierlow	-	11 A. & E. 607.	615. 622
v. Fordham	-	11 A. & E. 81.	- 39
v. Grand Junction Railway Com- pany	-	11 A. & E. 128. note (a)	- 122
v. Harrison	-	11 A. & E. 506. note b.	- 506
v. Hedges	-	11 A. & E. 163.	2. 161
v. Hull, Recorder of	-	8 A. & E. 638.	- 172
v. Humphrey	-	10 A. & E. 355.	- 505
v. James	-	8 C. & P. 131.	- 485
v. Justices of Bedfordshire	-	11 A. & E. 134.	- 141
v. Derbyshire	-	6 A. & E. 612. note (b)	- 89
v. Lancashire	-	11 A. & E. 144.	- 950
v. Rippon	-	7 A. & E. 417.	- 150
v. Sussex	-	10 A. & E. 682.	- 620
v. West Riding of York- shire	-	7 A. & E. 583.	- 187
v. Lambeth, Rector of	-	10 A. & E. 685.	621. 624
v. Lewis	-	8 A. & E. 356.	- 26
v. Liverpool, Mayor, &c.	-	8 A. & E. 881.	- 287
v. McGowan	-	9 A. & E. 435.	63. 499
v. Manchester and Leeds Railway Company	-	11 A. & E. 869.	- 876
v. Middleton-in-Teesdale	-	8 A. & E. 424. note (a)	- 136
v. Outwell	-	H. 1840.	- 956
v. Oxford, Mayor, &c. of	-	10 A. & E. 688.	613. 620
v. Paty	-	9 A. & E. 836.	- 611
v. Pepper	-	6 A. & E. 349.	- 516
v. Poole Corporation	-	2 Ld. Raym. 1105.	- 281
v. Poor Law Commissioners, In re Cambridge Union	-	7 A. & E. 745.	- 505
v. Quayle	-	7 A. & E. 730.	13. 68
v. St. Andrew and St. George	-	9 A. & E. 911.	- 566
v. St. Saviour's, Southwark	-	11 A. & E. 508.	517. 953
v. Slatter	-	10 A. & E. 756.	- 958
v. Somerby	-	May 24th, 1839.	- 563
v. Wallingford Union	-	7 A. & E. 925. 936.	- 958
Reid v. Dickens	-	11 A. & E. 505.	- 510
v. Furnival	-	9 A. & E. 510.	- 54
v. Lord Tenterden	-	10 A. & E. 259.	- 62
	-	5 B. & Ad. 499.	- 337
	-	1 C. & M. 538.	- 663
	-	4 Tyr. 111.	- 646

			Page
Remnant v. Bremridge	-	- { 8 <i>Tamnt.</i> 191. <i>S. C.</i> 2 <i>B. Moore</i> ,	- 652
Reniger v. Fogossa	-	- 94.	- 694
Rex v. Abergele	-	- <i>Plowd.</i> 1. 13.	149. 161
— v. Air and Calder Navigation Com-	-	- 5 <i>A. & E.</i> 795.	- 474
pany	-	- 9 <i>B. & C.</i> 820.	- 610
— v. Bagworth	-	- <i>Cald.</i> 179. 181.	- 110
— v. Baker	-	- 7 <i>A. & E.</i> 502.	- 156
— v. Baldwin	-	- 1 <i>Gude's Practice K. B.</i> 322.	- 681
— v. Baptist Mill Company	-	- 1 <i>M. & S.</i> 612.	- 54
— v. Banbury	-	- 5 <i>B. & Ad.</i> 706.	- 56
— v. —	-	- 5 <i>B. & Ad.</i> 176.	- 232
— v. Barlow	-	- 2 <i>Salk.</i> 609.	- 55
— v. Barmby-in-the-Marsh	-	- 7 <i>East</i> , 381.	- 507
— v. Barzey	-	- 4 <i>M. & S.</i> 255.	- 615
— v. Bedall	-	- <i>Ca. K. B. Temp. Hard.</i> 379.	- 475
— v. Bell	-	- 7 <i>T. R.</i> 598.	- 476
— v. —	-	- 5 <i>M. & S.</i> 221.	- 192
— v. Bennett	-	- 6 <i>C. & P.</i> 179.	- 477
— v. Birmingham Canal Company	-	- 2 <i>B. & Ald.</i> 570.	- 27
— v. — Rector, &c.	-	- 7 <i>A. & E.</i> 254.	- 89
— v. Bloxam	-	- 1 <i>A. & E.</i> 386.	- 683
— v. Boldero	-	- 4 <i>B. & C.</i> 467.	- 125
— v. Bowen	-	- 3 <i>C. & P.</i> 602.	- 733
— v. Boyall	-	- 2 <i>Burr.</i> 839.	- 752
— v. Bradford Chapelwardens	-	- 12 <i>East</i> , 556.	- 89
— v. Bramley	-	- 6 <i>T. R.</i> 330.	- 477
— v. Bridgewater, Duke, Trustees	-	- 9 <i>B. & C.</i> 68.	- 13
— v. —, Mayor, &c.	-	- 6 <i>A. & E.</i> 539.	- 613
— v. Brixham	-	- 8 <i>A. & E.</i> 375.	- 232
— v. Broderip	-	- 5 <i>B. & C.</i> 239.	- 82
— v. Bromyard	-	- 8 <i>B. & C.</i> 240.	- 952
— v. Brown	-	- 3 <i>T. R.</i> 574.	- 698
— v. Calow	-	- 3 <i>M. & S.</i> 22.	- 956
— v. Cambridge, Mayor, &c.	-	- 2 <i>T. R.</i> 456.	- 681
— v. Carlyon	-	- 3 <i>T. R.</i> 385.	- 953
— v. Carmarthen Corporation	-	- 2 <i>Burr.</i> 869.	- 197
— v. Cusson	-	- 3 <i>D. & R.</i> 56.	- 477
— v. Chaplin	-	- 1 <i>B. & Ad.</i> 926.	- 54
— v. Charles	-	- <i>Burr. S. C.</i> 706.	- 477
— v. Chelmer and Blackwater Naviga-	-	- 2 <i>B. & Ad.</i> 14.	- 476
tion Company	-	- 5 <i>B. & Ad.</i> 156.	- 625
— v. Chelsea Waterworks Company	-	- 7 <i>A. & E.</i> 471.	- 322
— v. Church Knowle	-	- 1 <i>B. & Ad.</i> 378.	- 615
— v. Cockermouth Inclosure Act Com-	-	- <i>Burr. S. C.</i> 136.	- 625
missioners	-	- 2 <i>A. & E.</i> 250.	- 239
— v. Coln St. Aldwin's	-	- 3 <i>B. & Ad.</i> 108. 4 <i>A. & E.</i> 751.	- 753
— v. Cottingham	-	- 2 <i>Burr.</i> 803.	- 811
— v. Cumberworth	-	- 12 <i>East</i> , 559.	- 232
— v. Davis	-	- 10 <i>A. & E.</i> 530.	- 239
— v. Diddlebury	-	- 4 <i>A. & E.</i> 723.	- 89
— v. Eastern Counties Railway Com-	-	- 2 <i>B. & Ad.</i> 595. <i>note (a)</i>	- 133
pany	-	- 6 <i>B. & C.</i> 145.	- 615
— v. Edge Lane	-	- 3 <i>T. R.</i> 724.	
— v. Eppingham, Earl	-		
— v. Ellis	-		
— v. Eriswell	-		

TABLE OF CASES CITED.

xxv

			Page
Rex v. Everdon	-	9 <i>East</i> , 101.	- 610
— v. Evett	-	6 <i>B. & C.</i> 247.	- 122
— v. Eye Bailiffs and Corporation	-	1 <i>B. & C.</i> 85.	- 232
— v. Farrington	-	<i>Russ. & Ry. C. C. R.</i> 207.	- 486
— v. Fielding	-	2 <i>Burr.</i> 719.	- 589
— v. Flockwood Inclosure Commissioners	Commis- }	2 <i>Chitt. R.</i> 251.	- 232
— v. Flower	-	8 <i>T. R.</i> 314.	- 282
— v. Gloucester, Mayor, &c.	-	5 <i>T. R.</i> 546.	- 751
— v. Goodcheap	-	6 <i>T. R.</i> 159.	- 754
— v. Green	-	9 <i>B. & C.</i> 203.	- 63
— v. Harris	-	4 <i>T. R.</i> 202.	- 733
— v. Harwood	-	2 <i>East</i> , 177.	- 507
— v. Heddingham Sible	-	<i>Burr. S. C.</i> 112.	- 80
— v. Hide	-	<i>Style</i> , 60.	- 394
— v. Hobhouse	-	2 <i>Chitt. Rep.</i> 207.	- 283
— v. Hodge	-	2 <i>B. & Ald.</i> 344. note (a)	- 951
— v. Holbeach	-	5 <i>A. & E.</i> 685.	- 95
— v. Honiton	-	<i>Burr. S. C.</i> 680.	- 90
— v. Howarth	-	2 <i>Bott.</i> 674. pl. 822. 6th ed.	- 610
— v. Ilkeston	-	4 <i>B. & C.</i> 64.	- 54
— v. Jetherell	-	<i>Parker</i> , 177.	- 827
— v. Jeyes	-	3 <i>A. & E.</i> 416.	- 72
— v. Johnson	-	{ 5 <i>A. & E.</i> 488. <i>S. C.</i> 1 <i>Macl. & Rob.</i> 1.	- 820
— v. Jolliffe	-	2 <i>B. & C.</i> 54.	- 578
— v. Jolliffe	-	2 <i>T. R.</i> 90.	- 475
— v. Justices of Cambridge	-	2 <i>A. & E.</i> 370.	- 78
— v. ——— Cambridgehire	-	3 <i>B. & Ad.</i> 887.	149. 161
— v. ———	-	4 <i>A. & E.</i> 111.	205. 287
— v. ——— Cheshire	-	8 <i>A. & E.</i> 398.	- 197
— v. ——— Cornwall	-	5 <i>A. & E.</i> 134.	- 95
— v. ——— Derbyshire	-	6 <i>A. & E.</i> 885.	93. 612
— v. ———	-	2 <i>Ld. Kenyon</i> , 299.	- 197
— v. ——— Hants	-	1 <i>B. & Ad.</i> 654.	- 137
— v. ——— Kent	-	3 <i>B. & Ad.</i> 250.	- 149
— v. ——— Lancashire	-	4 <i>B. & Ald.</i> 289.	149. 161
— v. ——— Leicester	-	4 <i>B. & C.</i> 896. note (a)	- 958
— v. ——— Norfolk	-	2 <i>B. & Ad.</i> 944.	- 136
— v. ———	-	5 <i>B. & Ald.</i> 484.	- 812
— v. ——— North Riding	-	6 <i>B. & C.</i> 152.	- 203
— v. ——— Oxfordshire	-	1 <i>B. & C.</i> 279.	- 93
— v. ——— Pembrokeshire	-	2 <i>B. & Ad.</i> 393.	- 89
— v. ——— St. Alban's	-	3 <i>B. & C.</i> 699.	- 197
— v. ——— Somersetshire	-	5 <i>B. & C.</i> 816.	197. 203
— v. ——— Staffordshire	-	4 <i>A. & E.</i> 84.	- 141
— v. ———	-	6 <i>A. & E.</i> 84.	- 958
— v. ——— Warwickshire	-	6 <i>A. & E.</i> 873.	- 136
— v. ——— West Riding	-	1 <i>A. & E.</i> 563.	196. 204
— v. Justices of West Riding	-	5 <i>T. R.</i> 629.	- 197
— v. Kelvedon	-	5 <i>A. & E.</i> 687.	93. 612
— v. Kimbolton	-	6 <i>A. & E.</i> 612.	- 89
— v. Kingswinford	-	7 <i>B. & C.</i> 236.	- 477
— v. Knight	-	4 <i>T. R.</i> 419.	- 500
— v. Lambeth	-	1 <i>Stra.</i> 525. <i>S. C.</i> 8 <i>Mod.</i> 61.	683
— v. Lindsey	-	14 <i>East</i> , 517.	- 239
— v. Linkinhorne	-	3 <i>B. & Ad.</i> 413.	- 54

			Page
Rex v. Llandilo Roads Commissioners	- 2 <i>T. R.</i> 232.	-	- 254
— <i>v. Llanrhydd</i>	- <i>Burr. S. C.</i> 658.	-	- 812
— <i>v. London, Bishop of</i>	- 15 <i>East</i> , 419.	-	- 735
— <i>v. ———, Mayor, &c.</i>	- 4 <i>T. R.</i> 21.	-	- 477
— <i>v. ———</i>	- 3 <i>B. & Ad.</i> 255.	-	819. 956
— <i>v. ———</i>	- 9 <i>B. & C.</i> 1.	-	- 825
— <i>v. Lower Mitton</i>	- 9 <i>B. & C.</i> 810.	-	- 477
— <i>v. Luffe</i>	- 8 <i>East</i> , 193.	-	- 615
— <i>v. Mahon</i>	- 4 <i>A. & E.</i> 575.	-	- 589
— <i>v. Maidstone</i>	- 5 <i>A. & E.</i> 326.	-	- 56
— <i>v. Maulden</i>	- 8 <i>B. & C.</i> 78.	-	- 175
— <i>v. Mersey and Irwell Navigation Company</i>	- 9 <i>B. & C.</i> 95.	-	474. 684
— <i>v. Milverton</i>	- 5 <i>A. & E.</i> 841.	-	- 287
— <i>v. Monkhouse</i>	- 2 <i>Stra.</i> 1184.	-	- 392
— <i>v. Netherthong</i>	- 2 <i>B. & Ald.</i> 179.	-	- 348
— <i>v. Newark upon Trent</i>	- 3 <i>B. & C.</i> 59.	-	- 94
— <i>v. Newcomb</i>	- 4 <i>T. R.</i> 368.	-	39. 81
— <i>v. Newton</i>	- <i>Burr. S. C.</i> 157.	-	- 80
— <i>v. Norwich and Watton Road Trustees</i>	- 5 <i>A. & E.</i> 563.	-	- 203
— <i>v. Ogden</i>	- 10 <i>B. & C.</i> 230.	-	- 951
— <i>v. Osgathorpe</i>	- <i>Burr. S. C.</i> 261.	-	- 625
— <i>v. Ouze Bank Commissioners</i>	- 3 <i>A. & E.</i> 544.	-	71. 425
— <i>v. Oxford Canal Company</i>	- 4 <i>B. & C.</i> 74.	10 <i>B. & C.</i> 163.	477
— <i>v. Palmer</i>	- 1 <i>B. & C.</i> 546.	-	- 477
— <i>v. Pappineau</i>	- 2 <i>Stra.</i> 686.	-	- 234
— <i>v. Parry</i>	- 6 <i>A. & E.</i> 810.	-	512. 953
— <i>v. Payn</i>	- 6 <i>A. & E.</i> 392.	-	72. 955
— <i>v. Philp</i>	- 1 <i>Moo. C. C. R.</i> 263.	-	- 486
— <i>v. Pomfret, Earl</i>	- 5 <i>M. & S.</i> 139.	-	- 681
— <i>v. Ponsonby</i>	- <i>Sayer's Rep.</i> 245.	-	- 505
— <i>v. Regent's Canal Company</i>	- 6 <i>B. & C.</i> 720.	-	- 477
— <i>v. Robinson</i>	- 2 <i>Burr.</i> 799.	-	- 733
— <i>v. Rochester, Bishop of</i>	- 12 <i>East</i> , 553.	-	- 681
— <i>v. Round</i>	- 4 <i>A. & E.</i> 139.	-	- 958
— <i>v. St. Agnes</i>	- 3 <i>T. R.</i> 480.	-	- 681
— <i>v. St. Albans</i>	- 3 <i>B. & C.</i> 699.	-	- 197
— <i>v. St. Austell</i>	- 5 <i>B. & Ald.</i> 693.	-	- 681
— <i>v. St. Giles, York</i>	- 3 <i>B. & Ad.</i> 573.	-	- 63
— <i>v. St. Gregory</i>	- 2 <i>A. & E.</i> 99.	-	- 79
— <i>v. St. James, Westminster</i>	- 2 <i>A. & E.</i> 241.	-	197. 203
— <i>v. St. John</i>	- <i>Selw. N. P.</i> 1172. 9th ed.	-	- 951
— <i>v. St. Katherine Dock Company</i>	- 4 <i>B. & Ad.</i> 360.	-	- 957
— <i>v. St. Mary, Bredin</i>	- 2 <i>B. & Ald.</i> 382.	-	- 55
— <i>v. ———, Leicester</i>	- 6 <i>M. & S.</i> 400.	-	- 477
— <i>v. Sandhurst</i>	- 6 <i>A. & E.</i> 130.	-	- 56
— <i>v. Saunders</i>	- 5 <i>D. & R.</i> 611.	-	- 204
— <i>v. Severn and Wye Railway Company</i>	- 2 <i>B. & Ald.</i> 646.	-	72. 238. 474
— <i>v. Shipton</i>	- 8 <i>B. & C.</i> 88.	-	56. 658
— <i>v. Sillifant</i>	- 4 <i>A. & E.</i> 354.	-	- 751
— <i>v. Smith</i>	- 3 <i>T. R.</i> 574.	-	- 952
— <i>v. Somerton</i>	- 7 <i>B. & C.</i> 463.	-	- 127
— <i>v. Southwold</i>	- <i>Burr. S. C.</i> 140.	-	- 610
— <i>v. Stainforth and Keadby Canal Company</i>	- 1 <i>M. & S.</i> 32.	-	- 321
— <i>v. Standish</i>	- <i>Burr. S. C.</i> 150.	-	- 610

TABLE OF CASES CITED.

xxvii

		Page
Rex v. Stoke Dameral, Minister, &c.	- 5 <i>A. & E.</i> 584.	71. 81
— v. Stokes	- 2 <i>M. & S.</i> 71.	- 530
— v. Stubbs	- 3 <i>T. R.</i> 395.	- 733
— v. Tate	- 4 <i>East</i> , 337.	- 807
— v. Terrott	- 3 <i>East</i> , 506.	- 63
— v. Thames and Isis Navigation Com- missioners	- 5 <i>A. & E.</i> 804.	72. 168
— v. Thomas	- 9 <i>B. & C.</i> 114.	464. 684
— v. Threlkeld	- 4 <i>B. & Ad.</i> 229.	- 94
— v. Trafford	- 1 <i>B. & Ad.</i> 874.	- 236
— v. Tremayne	- 4 <i>B. & Ad.</i> 162.	- 681
— v. Trevenen	- 2 <i>B. & Ad.</i> 339.	- 951
— v. Trowbridge	- 7 <i>B. & C.</i> 252.	- 624
— v. Watson	- 2 <i>T. R.</i> 199.	- 496
— v. Watts	- 2 <i>Esp.</i> 675.	- 234
— v. Welbank	- 4 <i>M. & S.</i> 222.	474. 681
— v. Whiston	- 4 <i>A. & E.</i> 607.	- 94
— v. Whitchurch	- 1 <i>B. & C.</i> 574.	- 86
— v. White	- 5 <i>A. & E.</i> 613.	155. 953
— v. Whitwell	- 5 <i>T. R.</i> 85.	- 505
— v. Wick St. Lawrence	- 5 <i>B. & Ad.</i> 526.	- 636
— v. Wilson	- <i>T.</i> 1835. <i>S. C.</i> 5 <i>Nev. & M.</i> 119.	684
— v. Whitney	- 5 <i>A. & E.</i> 191.	- 95
— v. Woking	- 4 <i>A. & E.</i> 40.	- 477
— v. Wright	- 1 <i>Burr.</i> 543	- 733
— v. Wykes	- <i>Andr.</i> 238.	- 610
— v. Wylie	- 1 <i>N. R.</i> 92.	- 133
Rhodes, Ex parte	- 15 <i>Ves.</i> 539.	- 384
Richards v. Bergavenny	- 2 <i>Vern.</i> 324.	- 434
— v. Fry	- 7 <i>A. & E.</i> 698.	- 697
— v. Heather	- 1 <i>B. & Ad.</i> 29.	- 962
Richardson v. Mellish	- 3 <i>Bing.</i> 334.	1013
Ricketts v. Bodenham	- 4 <i>A. & E.</i> 453.	- 755
Ridout v. Pain	- 3 <i>Atk.</i> 486. <i>S. C.</i> 1 <i>Ves. sen.</i> 10.	1006
Rishton v. Nesbit	- 6 <i>A. & E.</i> 103.	- 245
Roberts v. Read	- 16 <i>East</i> , 215.	- 306
Robertson v. Score	- 3 <i>B. & Ad.</i> 338.	- 555
Robinson, Ex parte, In re Freer	- 1 <i>Mont. & Mac.</i> 44.	- 357
— v. Robinson	- 1 <i>Burr.</i> 38.	- 434
Robson v. Spearman	- 3 <i>B. & Ad.</i> 493.	- 781
Roe dem. Allport v. Bacon	- 4 <i>M. & S.</i> 366.	1002
— Child v. Wright	- 7 <i>East</i> , 259.	1003
— Shell v. Pattison	- 16 <i>East</i> , 221.	1001
Rogers v. Allen	- 1 <i>Campb.</i> 309.	- 822
— v. Boehm	- 2 <i>Esp.</i> 702.	- 932
— v. Davenant	- 2 <i>Mod.</i> 8. (5th ed. 1793.)	- 752
Rooke's Case	- 5 <i>Rep.</i> 99 b.	- 393
Rose v. Main	- 1 <i>New Ca.</i> 357.	- 716
— v. Miles	- 4 <i>M. & S.</i> 101.	- 237
Ross v. Clifton	- 11 <i>A. & E.</i> 631.	- 644
Rowles v. Gells	- 2 <i>Cowp.</i> 451.	- 681
Roy v. Bristowe	- 2 <i>M. & W.</i> 241.	- 169
Rubery v. Stevens	- 4 <i>B. & Ad.</i> 241.	- 651
Rudder v. Price	- 1 <i>H. Bl.</i> 547.	- 705
Rumball v. Ball	- 10 <i>Mod.</i> 38.	- 707
Rushworth v. Countess of Pembroke	- <i>Hardr.</i> 472.	- 808
Rutter v. Chapman	- 8 <i>M. & W.</i> 1.	159. 954
Rybot v. Peckham	- 1 <i>T. R.</i> 731, note (a)	- 535

S

	Page
Sadler v. Leigh - - -	4 <i>Camp.</i> 197. - 865
Samuel v. Duke - - -	3 <i>M. & W.</i> 622. - 864
Sanchar's, Lord, Case - - -	9 <i>Rep.</i> 117. a. - 154
Sandilands v. Marsh - - -	3 <i>B. & Ald.</i> 673. - 962
Sargent v. Morris - - -	3 <i>B. & Ald.</i> 277. - 896
Saunders v. Bridges - - -	3 <i>B. & Ald.</i> 95. - 534
Sawle v. Paynter - - -	1 <i>D. & R.</i> 307. - 535
Scales v. Pickering - - -	4 <i>Bing.</i> 448. - 239
Scamler v. Johnson - - -	<i>T. Jones</i> , 227. - 408
Scott v. Dixon - - -	2 <i>Wils.</i> 3. - 668
— v. Gillmore - - -	3 <i>Taunt.</i> 226. - 1029
Seago v. Deane - - -	4 <i>Bing.</i> 459. - 443
Sedgworth v. Overend - - -	7 <i>T. R.</i> 279. - 210
Senhouse v. Christian - - -	1 <i>T. R.</i> 560. - 673. 770
Serjeants at Law, In re - - -	6 <i>New Ca.</i> 232. - 758
Seton v. Slade - - -	7 <i>Ves.</i> 265. - 596
Sewell v. Young - - -	2 <i>Keb.</i> 819. - 653
Shaftesbury's, Earl, Case - - -	{ 6 <i>How. St. Tr.</i> 1269. <i>S. C.</i>
Sheerman v. Thompson - - -	1 <i>Mod.</i> 144. - 281
Shelley's Case - - -	11 <i>A. & E.</i> 1036. - 1036
Sheriff of Middlesex Case - - -	1 <i>Rep.</i> 93 b. 104 a. - 435
Ship-money Case - - -	11 <i>A. & E.</i> 273. - 269
Shirley v. Wright - - -	3 <i>How. St. Tr.</i> 825. - 281
Sibbald v. Roderick - - -	2 <i>Salk.</i> 700. - 976
Siffin v. Walker - - -	11 <i>A. & E.</i> 58. - 81
Sims v. Simpson - - -	2 <i>Camp.</i> 307. - 595
Skewys v. Chamond - - -	1 <i>New Ca.</i> 506. - 865
Slackford v. Austen - - -	1 <i>Dyer</i> , 59 b. - 260
Smalcomb v. Buckingham - - -	14 <i>East</i> , 468. - 832
Smith v. Alexander - - -	- <i>Carth.</i> 419. - 553
— v. Barrett - - -	5 <i>Dowl. P. C.</i> 13. - 1030
— v. Brown - - -	1 <i>Sid.</i> 161. - 501
— v. Compton - - -	2 <i>M. & W.</i> 851. - 844
— v. Hayward - - -	3 <i>B. & Ad.</i> 407. - 31
— v. Nicholls - - -	7 <i>A. & E.</i> 544. - 802
— v. Walton - - -	5 <i>New Ca.</i> 208. - 185
Smyth, Ex parte - - -	8 <i>Bing.</i> 235. - 725
Snelling v. Lord Huntingfield - - -	{ 2 <i>C. M. & R.</i> 748. <i>S. C. Tyr. &</i>
Snelling's Case - - -	<i>Gr.</i> 222. 3 <i>A. & E.</i> 719. 724. 751
Snow v. Allen - - -	1 <i>C. M. & R.</i> 30. <i>S. C.</i> 4 <i>Tyr.</i> 606. 424
Solly v. Neish - - -	3 <i>Rep.</i> 82 b. - 705
South Carolina Bank v. Case - - -	1 <i>Stark. N. P. C.</i> 502. - 487
Southerton v. Whitlock - - -	2 <i>C. M. & R.</i> 355. <i>S. C.</i> 5 <i>Tyr.</i> 625. 414
Spencer v. Goter - - -	8 <i>B. & C.</i> 427. - 595
Staple v. Heydon - - -	2 <i>Str.</i> 690. - 936
Stead v. Dawber - - -	1 <i>H. Bl.</i> 78. - 187
Stennel v. Hogg - - -	6 <i>Mod.</i> 1. 5. - 250
Stephens v. Badcock - - -	10 <i>A. & E.</i> 57. - 427
Stilk v. Meyrick - - -	1 <i>Wms. Saund.</i> 228. b. - 239
Stockdale v. Hansard - - -	3 <i>B. & Ad.</i> 354. - 929
— v. — - - -	3 <i>Camp.</i> 317. <i>S. C.</i> 6 <i>Esp.</i> 129. 858
Stocker v. Edwards - - -	8 <i>Dowl. P. C.</i> 148. - 253
	9 <i>A. & E.</i> 1. - 259. 280
	2 <i>Show.</i> 398. - 437

TABLE OF CASES CITED.

xxix

			Page
Stourbridge Canal Company v. Wheeley	-	2 <i>B. & Ad.</i> 792.	- 239
Stowell v. Lord Zouch	-	- <i>Plowd.</i> 353. 386.	- 694
Stradling v. Morgan	-	- <i>Plowd.</i> 199. 204, 205.	- 694
Strangford v. Green	-	- 2 <i>Mod.</i> 228.	- 962
Stratton v. Hill	-	- 3 <i>Price</i> , 253.	- 706
Streater's Case	-	- 5 <i>How. St. Tr.</i> 565.	- 281
Sturch v. Clarke	-	- 4 <i>B. & Ad.</i> 113.	- 783
Summers v. Jones	-	- 3 <i>Mont. & Agr.</i> 400.	- 354
Sutton v. Clarke	-	- 6 <i>Taunt.</i> 29.	- 235
—— v. Tatham	-	- 10 <i>A. & E.</i> 27.	- 558

T

Tapley v. Wainwright	-	- 5 <i>B. & Ad.</i> 395.	- 671
Tawney's Case	-	- 2 <i>Ld. Raym.</i> 1009.	- 752
Taylor v. Waters	-	- 7 <i>Taunt.</i> 374.	- 36
Taylor v. Chambers	-	- <i>Cro. Jac.</i> 68.	- 328
—— dem. Atkyns v. Horde	-	- 1 <i>Burr.</i> 60.	- 847
—— v. Welstead	-	- <i>Cro. Jac.</i> 443.	- 124
Temple v. Keily	-	- 9 <i>Dowl. P. C.</i> 62.	- 916
Thacker v. Wilson	-	- 3 <i>A. & E.</i> 142.	- 648
Thicknesse v. Lancaster Canal Company	-	- 4 <i>M. & W.</i> 472.	- 235
Thomas v. Cook	-	- 8 <i>B. & C.</i> 728. 732.	- 442
—— v. Desanges	-	- 2 <i>B. & Ald.</i> 586.	- 865
Thompson v. Davenport	-	- 9 <i>B. & C.</i> 78.	- 595
—— v. Raikes	-	- 1 <i>A. & E.</i> 863.	- 156
Thornton v. Meux	-	- <i>Moo. & M.</i> 43.	- 595
Threadneedle v. Linum	-	- 1 <i>Freem. K. B. & C. P.</i> 180.	- 406
Thursby v. Plant	-	- 1 <i>Wms. Saund.</i> 235. note (8)	- 408
Tickle v. Brown	-	- 4 <i>A. & E.</i> 369.	- 579. 695
Till v. Wilson	-	- 7 <i>B. & C.</i> 684.	- 353
Tilney v. Norris	-	- <i>Carth.</i> 519. <i>S. C.</i> 1 <i>Ld. Raym.</i> 553. 653	- 832
Tipping v. Johnson	-	- 2 <i>B. & P.</i> 357.	- 794
Tomkins v. Ashby	-	- 6 <i>B. & C.</i> 541.	- 409
Tompson v. Withers	-	- 2 <i>Bulstr.</i> 263.	- 581
Toogood v. Spyring	-	- { 1 <i>C. M. & R.</i> 181. <i>S. C.</i> 4 <i>Tyr.</i> 582.	- 246
Tooth v. Boddington	-	- 1 <i>Bing.</i> 208.	- 452
Townsend v. Hunt	-	- <i>Cro. Car.</i> 408.	- 852
—— v. Pastor	-	- 4 <i>Leon.</i> 52.	- 236
Trafford v. The King	-	- 8 <i>Bing.</i> 204. <i>S. C.</i> 2 <i>Cro. & J.</i> 265.	- 651
Tremeere v. Morison	-	- 1 <i>New Ca.</i> 89.	- 260
Trewynnard's Case	-	- 1 <i>Hals. Prec.</i> 60.	- 240
Trower v. Chadwick	-	- 3 <i>New Ca.</i> 534.	- 558
Trueman v. Loder	-	- 11 <i>A. & E.</i> 589.	- 705
Turbill's Case	-	- 1 <i>Wms. Saund.</i> 68. note (2)	- 166
Turnor v. Darnell	-	- 5 <i>M. & W.</i> 28.	- 640
Twigg v. Potts	-	- 1 <i>C. M. & R.</i> 89. <i>S. C.</i> 3 <i>Tyr.</i> 969.	- 217
Tyler v. Duke of Leeds	-	- 2 <i>Stark. N. P. C.</i> 218.	- 977

U

Umphelby v. McLean	-	- 1 <i>B. & Ald.</i> 42.	- 233
Uthwatt v. Bryant	-	- 6 <i>Taunt.</i> 317.	- 1002

V

			Page
Vallance v. Dewar	-	- 1 <i>Camp.</i> 503.	- 555
— Ex parte	-	- 2 <i>Deacon B. C.</i> 354.	- 206
Vaughan v. Glenn	-	- 8 <i>Dowl. P. C.</i> 396.	- 916
Vauxhall Bridge Company, Ex parte	-	- 1 <i>Glyn. & J.</i> 101.	- 206
Viney v. Barss	-	- 1 <i>Esp.</i> 293.	- 133
Vivian v. Jenkin	-	- 3 <i>A. & E.</i> 741.	- 412

W

Walley v. Montgomery	-	- 3 <i>East</i> , 585.	- 896
Walton v. Shelley	-	- 1 <i>T. R.</i> 296. 302.	- 791
Watkins v. Wake	-	- 7 <i>M. & W.</i> 488.	- 709
Watson's, Leonard, Case	-	- 9 <i>A. & E.</i> 751.	- 280
Weaver v. Price	-	- 3 <i>B. & Ad.</i> 409.	- 40
Webb v. Fox	-	- 7 <i>T. R.</i> 391.	- 353
Weekes v. Peach	-	- <i>Lutw.</i> 1226.	- 410
Weld v. Gas Light Company	-	- 1 <i>Stark. N. P. C.</i> 189.	- 237
Wells v. Ody	-	- 1 <i>M. & W.</i> 452. <i>S. C. Tyr. & G.</i> 715. 635	-
Welsh v. Craig	-	- 8 <i>Mod.</i> 373. <i>S. C. 2 Stra.</i> 680.	- 705
— Ex parte, In re Merryweather	-	- <i>Mont. Ca. Bank.</i> 276.	- 360
Wennall v. Adney	-	- 3 <i>B. & P.</i> 247.	- 443
Whaley v. Tancred	-	- 1 <i>Ventr.</i> 241. <i>S. C. 2. Lev.</i> 52.	- 847
Whately v. Conquest	-	- <i>Carter</i> , 217.	- 410
Wheatly v. Lane	-	- 1 <i>Wm. Saund.</i> 219 g.	- 865
White v. Collins	-	- <i>Comyns</i> , 289.	- 434
— v. Proctor	-	- 4 <i>Taunt.</i> 209.	- 596
— v. Wright	-	- 3 <i>B. & C.</i> 273.	- 1037
Whitehead v. Tuckett	-	- 15 <i>East</i> , 400.	- 595
Whitelegg v. Richards	-	- 2 <i>B. & C.</i> 45.	- 831
Whitelock v. Heddon	-	- 1 <i>B. & P.</i> 243.	- 433
Whittaker v. Mason	-	- 2 <i>New Ca.</i> 369.	- 557
Whittenbury v. Law	-	- 6 <i>New Ca.</i> 345.	- 527
Whitton v. Peacock	-	- 2 <i>New Ca.</i> 411.	- 310
Wilkes v. Hungerford Market Company	-	- 2 <i>New Ca.</i> 281.	- 237
Wilkins v. Wright	-	- 2 <i>Cro. & M.</i> 191. <i>S. C. Tyr.</i> 824.	- 780
William of Daventry's Case	-	- 1 <i>Hal. Pl. C.</i> 420.	- 150
— v. Gwyn	-	- 2 <i>Wms. Saund.</i> 45. e, f.	- 247
Williams v. Breedon	-	- 1 <i>B. & P.</i> 329.	- 187
— v. Burgess	-	- 10 <i>A. & E.</i> 499.	- 441
— v. Grey	-	- 1 <i>Ld. Ray.</i> 40, 41.	- 835
— v. Leper	-	- 3 <i>Burr.</i> 1886.	- 442
— v. Mostyn	-	- 4 <i>M. & W.</i> 145.	- 546
— v. Pritchard	-	- 4 <i>T. R.</i> 2.	- 996
— v. Waring	-	- 4 <i>Dowl. P. C.</i> 200.	- 864
Williamson v. Johnson	-	- 1 <i>B. & C.</i> 146.	- 341
— v. Losh	-	- <i>Chitty on Bills</i> , 75. note (x), 9th ed.	- 455
Willion v. Barkley	-	- <i>Plowd.</i> 225. 231.	- 694
Wilson v. Hart	-	- 7 <i>Taunt.</i> 295.	- 595
— v. Ray	-	- 10 <i>A. & E.</i> 82.	- 990
— v. Weller	-	- 1 <i>Br. & B.</i> 57.	- 392
Winchcombe v. Bishop of Winchester	-	- <i>Hob.</i> 165. 5th ed.	- 79
Winter v. Brockwell	-	- 8 <i>East</i> , 308.	- 35
— v. Miles	-	- 10 <i>East</i> , 578.	- 259

TABLE OF CASES CITED.

xxxi

			Page
Wintle v. Lord Chetwynd	-	- 7 <i>Dowl. P. C.</i> 554.	- 546
Withers v. Henley	-	- 3 <i>Bull.</i> 96.	- 831
Woodgate v. Knatchbull	-	- 2 <i>T. R.</i> 148.	- 814
Woodland v. Fuller	-	- <i>E.</i> 1840.	- 103
Woodward's Case	-	- 3 <i>Mod.</i> 211.	- 752
Worcester's, Bishop, Case	-	- <i>Poph.</i> 84.	- 327
Wordsworth v. Harley	-	- 1 <i>B. & Ad.</i> 391.	- 306
Worley v. Blunt	-	- 9 <i>Bing.</i> 635.	- 246
Wright v. Doe dem. Tatham	-	- 4 <i>New Ca.</i> 489.	- 324
— v. —	-	- 1 <i>A. & E.</i> 5.	- 1013
— v. —	-	- 7 <i>A. & E.</i> 315.	- 615
— v. Elliot	-	- 5 <i>A. & E.</i> 818.	- 168
— v. Lainson	-	- 2 <i>M. & W.</i> 739.	- 544
— v. Simpson	-	- 6 <i>Ves.</i> 714. 730.	- 181
— v. Williams	-	- { 1 <i>M. & W.</i> 77. <i>S. C. Tyr. & Gr.</i>	-
		- { 375.	- 695
— v. Woodgate	-	- { 2 <i>C. M. & R.</i> 573. <i>S. C. Tyr. & G.</i> 12.	- 382

Y

Yard v. Ford	-	- 2 <i>Wms. Saund.</i> 174. n. (2)	- 574
Yearbook	-	- <i>Mich.</i> 26 <i>H. 8. f. 8. B. pl.</i> 6.	- 246
Young v. Cole	-	- 3 <i>New Ca.</i> 724.	- 554
— v. Rishworth	-	- 8 <i>A. & E.</i> 470.	- 555
— v. Spencer	-	- 10 <i>B. & C.</i> 145.	- 44

ERRATA.

- Page 31. marg. note, lines 12. 14., for "bill" read "note."
39. lines 13, 14., for "warrants were" read "warrant was," and
line 14., for "their" read "its."
165. line 5., for "absolute" read "discharged."
175. marg. note, line 13., for "plaintiff" read "defendant."
253. marg. note, last paragraph, for "sberiffs" read "sberiff," and correct the rest
of the sentence accordingly.
483. marg. note, last line but two, for "of want of" read "that he had."
590. note (a), for "Regina" read "Rex."
572. note (a), line 2., for "replied" read "pleaded."
784. line 19., for "c. 24." read "c. 44."
859. line 6., for "defendant" read "plaintiff."

1093. (Index), under the title **RULES (GENERAL)**, the following head is omitted in
some impressions of this volume:—

"VIII. *Est. 3 Vict.* Admission and re-admission of attorneys. *Reg. Gen.* 868'."

C A S E S

ARGUED AND DETERMINED

1839.

IN THE

Court of QUEEN's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Michaelmas Term and
Vacation,

In the Third Year of the Reign of VICTORIA.

The Judges who usually sat in Banc in this Term and
Vacation were,

LORD DENMAN C. J.	WILLIAMS J.
PATTESON J.	COLERIDGE J.

MEMORANDA.

Mr. Justice *Vaughan* died in last *Trinity* vacation.

In this term, Mr. Baron *Maule*, having resigned his seat in the Court of *Exchequer*, was appointed a Judge of the Court of *Common Pleas* in the place of Mr. Justice *Vaughan*.

VOL. XI.

B

In

1839.

In the same term, Sir *Robert Monsey Rolfe*, Knight, her Majesty's Solicitor-General, was appointed a Baron of the Court of *Exchequer*, in the place of Mr. Justice *Maule*, having first been called to the degree of the coif, when he gave rings with the motto *Suaviter et fortiter*.

In the same term, *Thomas Wilde* Esquire, one of the Queen's serjeants at law, was appointed her Majesty's Solicitor-General, in the place of Mr. Baron *Rolfe*. He afterwards received the honour of knighthood.

REGULA GENERALIS.

(Read in Court, *November 8th*.)

It is ordered that no rule be hereafter granted for filing any information in the nature of a quo warranto, unless, at the time of moving, an affidavit be produced by which some person or persons shall depose upon oath that such motion is made at his or their instance as relator or relators; and that such person or persons shall be deemed to be the relator or relators in case such rule shall be made absolute, and shall be named as such relator or relators in such information in case the same shall be filed, unless this Court shall otherwise order (a).

By the Court.

(a) See *Regina v. Hedges*, post, p. 163.

1839.

The QUEEN *against* CHRISTOPHER ALDERSON. *Saturday,*
November 2d.

The QUEEN *against* GODDARD.

The QUEEN *against* POTTER.

SIR *W. W. Follett*, in *Michaelmas* term, 1838, *November* 13th, obtained a rule nisi for a quo warranto information, calling upon *Christopher Alderson* to shew by what authority he claimed to be an alderman of the borough of *Caernarvon*. The rule stated the following grounds. 1. That he was not duly elected. 2. That immediately after the first election of aldermen under stat. 5 & 6 *W. 4. c. 76.* the councillors did not appoint who should be the aldermen to go out of office in 1838 (*a*). 3. That immediately after the election of aldermen in 1837 the councillors did not appoint which of the aldermen should go out of office in 1838. 4. That there was no vacancy in the office of alderman at the time of the supposed election of *C. A.* Similar rules

Rules nisi for quo warranto informations were obtained against several parties for exercising the office of alderman, on the ground that they had been unduly elected. Pending such rules, a Burgess in whose room one of the parties had been elected, moved the Court that, if the rules were made absolute, the management of the prosecutions might be transferred to himself, alleging

that he had been improperly displaced, and had contemplated moving for quo warranto informations against the parties elected; that the informations now in question had been moved for collusively by persons of a political party in the borough, adverse to his own, and the same with that of the persons elected; that the relator was in low circumstances, and in the employment of the attorney prosecuting the rules; and that the attorney had employed the same agents in *London* to instruct counsel for and against the rules. In answer, it was stated that the motions were made bonâ fide and without collusion, for the purpose of trying a point of law; that the course complained of had been taken for the purpose of having the question discussed adversely, but at the least possible expence; and that the relator was interested in the affairs of the borough, and had obtained the rules for the sole purpose of having the question tried, and not on the request of the attorney, and was liable to him for the costs.

The Court, on making the rules absolute for quo warranto informations, directed that the management of the prosecutions should be transferred as prayed: although they were of opinion that the facts did not shew collusion, or a design on the part of the original prosecutors to obtain any undue advantage.

(a) See stat. 5 & 6 *W. 4. c. 76. s. 25.*

1839.

—
The QUEEN
against
ALDERSON.

were obtained against *Goddard* and *Potter*, on the same grounds; and all were drawn up on reading the affidavit of *Edward Roberts*.

In *Hilary* term, 1839, rules were obtained, on the affidavits of *William Lloyd Roberts* and another, calling on *Alderson*, *Goddard*, and *Potter*, to shew cause why quo warranto informations should not be exhibited against them for exercising the same offices. The grounds of application were the same verbatim, as those above stated. In each rule the following alternative was added: "or why the above-mentioned affidavit of *W. L. Roberts* should not be read on shewing cause against the rule nisi for liberty to file a like information against the said" &c., "obtained the last term by or on behalf of *Edward Roberts*, and why the said *W. L. Roberts* should not be at liberty to appear and be heard by counsel in support of such last-mentioned rule, on cause being shewn against the same; and why, in the event of such rule being made absolute, the said *W. L. Roberts* should not have the conduct and management of the prosecution thereof." The rules ordered that further proceeding on the previous rules should be stayed until cause were shewn in these.

The affidavits in support of this application stated that the rule at the instance of *Edward Roberts* was obtained on *November* 19th, 1838, and required cause to be shewn on *November* 22d; that cause had not been shewn, nor had the rule been made absolute or discharged, or the time for shewing cause enlarged, or any application made for that purpose. *William Lloyd Roberts*, an inhabitant householder and a burgess enrolled, also stated that the burgesses and inhabitants of *Caernarvon* were divided into two parties, the liberal and reform party,
of

of which the deponent was, and the tory and conservative party, to which *Henry Rumsey Williams*, the attorney who had acted in obtaining the first-mentioned rule, belonged. That all the elections for all the offices of the borough in 1835 and 1836 had been respectively the subject of proceedings in quo warranto, which *Williams* and the deponent, who was also an attorney, had been employed in instituting and carrying on for their respective parties. That on 29th *October*, 1838, the mayor and councillors met at the guildhall, and appointed three aldermen, of whom the deponent was one, to go out of office on the ensuing 9th of *November*, no declaration having been made on that subject in 1835, 1836, or 1837. That on *November* 9th, 1838, the council elected, instead of the last-mentioned aldermen, the now defendants, *Alderson*, *Goddard*, and *Potter*. That on the same day *H. R. Williams* was elected mayor. That the deponent *W. L. Roberts* had been making enquiries with the purpose of exhibiting quo warranto informations against the three new aldermen, when he found that the first mentioned rule nisi had been obtained against *Alderson*. That the agents making that application were the *London* agents of *H. R. Williams*. That in *Michaelmas* term, 1838, one of those agents appeared in Court instructing counsel both for and against the rule in *Alderson's* case. That from this employment of the agents, and otherwise, the deponent was convinced that the motions first mentioned were friendly applications, and made for the purpose of preventing adverse and bona fide ones. And that, as the deponent believed, the titles would not be fairly litigated unless the deponent had the future conduct and management of the proceedings. *W. L. Roberts* also stated circum-

1839.

The QUEEN
against
ALDERSON.

1839.

The QUEEN
against
ALDERSON.

stances tending to shew that *H. R. Williams* had taken some part in preparing the affidavit on which the first-mentioned rules were obtained; and he alleged that *Edward Roberts*, who had sworn it, was of *Williams's* party, and, though describing himself in his affidavit as a shoemaker, had, for fifteen years past, been a bailiff and process-server in the employment of *Williams*.

Edward Roberts deposed, in answer, that he had for several years been a burgess of *Caernarvon*, and taken an active part in its politics. That, reports having arisen in the borough that the election of aldermen in 1838 would be and was illegal, because the council had not previously declared what aldermen should go out in that year, he, among other burgesses, determined to dispute the validity of such election, and to request *H. R. Williams* to take the necessary steps for that purpose; and accordingly he, the deponent, did so apply to *Williams* immediately after the 9th *November*, and after the new aldermen had taken upon themselves the office. That the applications to this Court at the deponent's instance were not made at the request of *Williams*; and that they were made without collusion, bonâ fide, and for the sole purpose of obtaining the judgment of the Court whether the aldermen were legally elected or not. He further stated that he acted as a sheriff's officer, served processes, and executed writs, for *Williams* and for several other attorneys also; that he was brought up a shoemaker, and, when not employed as aforesaid, still worked occasionally at that trade: and that he was liable to *Williams* for all the costs which had been or might be incurred in obtaining or prosecuting the rules nisi. *Alderson*, *Goddard*, and *Potter* denied any collusion, and deposed that, as soon

as

IN THE THIRD YEAR OF VICTORIA.

as they heard of the first-mentioned rules, they instructed *Williams* to defend their title, but to do so in the most economical manner; and that they were respectively liable to him for the costs. *Williams*, in his affidavit, deposed that, on being so applied to, he informed *Alderson* and the other parties that he would conduct the defence fairly and bonâ fide, so as to obtain the judgment of the Court as upon the most adverse argument; to which they assented; and he directed his agents accordingly. He stated that he was the more induced to undertake opposing the rules as there was no fact in dispute, the only question being on the construction of stats. 5 & 6 *W. 4. c. 76.*, and 7 *W. 4. & 1 Vict. c. 78.* And that the only object contemplated was to have the question of law decided fairly and without the ruinous costs which had attended former proceedings of the same nature respecting borough offices in *Caernarvon*. One of the agents deposed that he had acted in conformity with the above directions (specifying the course he had taken in instructing counsel), and that the rules had stood over from *Michaelmas* term, 1838, to *Hilary* term, 1839, without being formally enlarged, by an arrangement between counsel, to which the agents were not parties.

1839.

—
The QUEEN
against
ALDERSON.

Erle now shewed cause against the rule of *Michaelmas* term in the case of *Mr. Alderson*. Sir *W. W. Follett* supported the rule.

The Court said that the question on the statutes must be further discussed; and Sir *W. W. Follett*'s rules were therefore made absolute in the three cases.

1839. Sir *J. Campbell*, Attorney General, and *Jervis* for *W. L. Roberts*, then urged that the rules of *Hilary* term, for transferring the management of the prosecutions to him, should be made absolute.

—
The QUEEN
against
ALDERSON.

Sir *W. W. Follett* and *R. V. Richards* shewed cause, and contended that, on the affidavits, there appeared no laches in the present prosecutor, and no ground for imputing collusion.

Sir *J. Campbell* and *Jervis*, *contra*. It is in the discretion of the Court to say who shall conduct this proceeding. The same attorney ought not to appear for both relator and defendants. [Lord *Denman* C. J. What mischief can result from the relator's attorney conducting this prosecution? It is not as if his duty would be to collect facts. The law only is in dispute.] It is admitted that the proceeding is friendly, conducted with the alleged view of saving costs. [Lord *Denman* C. J. I see no harm in that.] The rules have once been dropped. [Coleridge J. If there were collusion, the object would rather have been to keep them alive.] No harm can arise from *W. L. Roberts* conducting this prosecution; and a possible danger is suggested, if it be managed by the other party. *W. L. Roberts* has an interest in the question. The costs will be under the control of the Court; but it will make no difference as to them, whether the one or the other party prosecutes.

Lord DENMAN C. J. There is very imperfect evidence of collusion in this case; and it may be that the parties originally applying for the informations intended
bonâ

bonâ fide to try the question of law. At the same time the mere circumstance of a person connected with a political party in the borough acting as attorney on both sides is so striking that we ought not to suffer such a state of things without strong proof that no improper consequence could ensue. Here the actual relator appears to be in bad circumstances, and under the controul of the party acting as attorney. I do not see what unfair advantage can be contemplated by these parties; but it is so important in proceedings of this kind that no suspicion should attach to them, that we think it the safest course to forbid the carrying on of the prosecutions by the original relator, and to make the rules absolute for giving the management of them to the party now applying.

1839.

The QUEEN
against
ALDERSON.

WILLIAMS and COLERIDGE Js. concurred (a).

Rules absolute accordingly.

(a) *Patteson J.* had left the Court.

The QUEEN *against* The Mayor, Aldermen, and Burgesses, of the Borough of CARMARTHEN.

Monday,
November 4th.

E. V. WILLIAMS obtained a rule, in last *Michaelmas* term, calling upon the mayor, aldermen, and burgesses of the county of the borough of *Carmarthen*

Before stat. 5 &
6 W. 4. c. 76.,
a person had
acted as clerk
to the justices
of a corpo-

ration; he had received no formal appointment from the corporation; but the governing body had ordered that he should have a fixed salary from the corporation funds, besides his perquisites. The office was not named in the charter. He was displaced by the justices appointed under the act.

Held, that he was entitled to compensation under sect. 66; and, the corporation having refused to give any compensation, and the Lords of the Treasury, upon appeal, having ordered one, this Court granted a mandamus requiring the corporation to give a bond for the amount.

to

1839.

The QUEEN
against
The
Mayor, &c., of
CARMARTHEN.

to shew cause why a mandamus should not issue, commanding them to execute a bond under the common seal of the borough for the payment to *John Williams* of an annuity of 66*l.* 13*s.* 4*d.*, awarded to him by the Lords of the Treasury, as a compensation for the loss of his office of clerk to the magistrates of the borough, from the time he was deprived of his office, to continue for his life.

The rule was obtained on affidavit by *J. Williams* that, before stat. 5 & 6 *W. 4. c.* 76., the justices of the borough were the mayor, recorder, and six peers, of whom the mayor and peers were elected annually, and the recorder was an officer for life. *J. Williams* was appointed clerk to the magistrates in 1796; and he deposed that he considered, and had reasonable grounds to believe, from the leading members of the corporation, and did believe, that the appointment would continue secured to him quàm diù se bene gesserit; the more so from the fact that, although the borough had been administered by a party opposed to that under which he received his appointment, he had held the office continually under the original appointment till displaced as after-mentioned. His original salary had, as he stated, been 40*l.*; but, some years after his appointment, he was applied to by some leading members of the corporation to consent that the salary should be reduced for a time to 20*l.*, the corporation being under pecuniary embarrassment; to which he consented on condition that the original salary should be paid as soon as the cause for such reduction was removed. The salaries were regularly paid by the chamberlain of the corporation. He estimated the fees and emoluments, in each of the five years preceding the passing of

of stat. 5 & 6 *W. 4. c. 76.*, at 80*l.* The salary of 20*l.* was paid till 25th *December* 1835, when it was discontinued; but *J. Williams* continued to act as justices' clerk till *May* 1836, when the justices, appointed under stat. 5 & 6 *W. 4. c. 76. ss. 98, 107.*, were qualified; they then appointed a new clerk to the justices under sect. 102. *J. Williams* applied to the council for compensation; which being refused, he appealed to the Lords of the Treasury; and they awarded him an annuity of 66*l.* 13*s.* 4*d.*; but the council refused, on his application, to give a bond.

In opposition to the rule, the town-clerk of *Carmarthen* deposed that in the books and muniments of the corporation there was no appointment of *J. Williams* to any office whatever, with the exception of the following entries. First, an order of 18th *December* 1797, by the assembly of the mayor, burgesses, and commonalty of the old corporation, ordering "that the chamberlain of this borough pay out of the corporation rents or monies in his hands unto *Mr. John Williams*, the magistrates' clerk, the sum of 20*l.* for the great trouble he has had in assisting the mayor and magistrates in the execution of their offices the last year." Secondly, an order, by the same, of 25th *January* 1810, "that *Mr. John Williams* be employed as one of the attornies for this corporation in conjunction with the other professional gentlemen already appointed." Thirdly, an order, by the same, of 26th *October* 1810, "that the sum of 40*l.* a year be allowed to *Mr. John Williams*, as clerk to the magistrates of this borough, from this day, instead of the former salary of 20*l.*" Fourthly, an order, by the same, of 4th *October* 1819, reciting (with a particular statement of facts) that the expenditure of the corporation

1839.

The QUEEN
against
The
Mayor, &c., of
CARMARTHEN.

1839. poration greatly exceeded its revenue, and directing
 ——— certain sales to be made, and that “the following
 The QUEEN deductions be in future made in the under-mentioned
 against salaries,” including “the justices’ clerk, 20*l*.” That in
 The Mayor, &c., of the charter (of 27th *July* 1764) which was in force up
 CARMARTHEN. to the passing of stat. 5 & 6 *W. 4. c.* 76. there was not
 any office or situation of clerk to the mayor, magis-
 trates, peers, or justices of the said borough created, or
 contemplated. That *J. Williams*, upon attending the
 town-council on the subject of his application for com-
 pensation, had stated that he had no written appointment.
 That all appointments to offices, whether annual or for
 good behaviour, contemplated in the charter, were fully
 set forth, and noticed and sanctioned, in the books and
 records of the corporation, by the signatures of the
 mayor, burgesses, and commonalty of the borough in
 common hall assembled. That he, the town clerk, had
 been informed and believed that, in consequence of the
 magistrates for the time being bringing their own clerk,
 and irregularities having been occasioned thereby, the
 corporation agreed to pay any one whom the mayor
 and magistrates for the time being should appoint a
 settled sum out of the corporation property, in addition
 to the perquisites of his office.

Sir *J. Campbell*, Attorney General, now shewed
 cause. The Lords of the Treasury had no jurisdiction.
 This is not a case within sect. 66 of stat. 5 & 6 *W. 4.*
c. 76. It cannot be said that *Williams* held an office
 which has been abolished, or from which he has been
 removed, or to which he has not been reappointed.
 The justices, whose servant he was, no longer hold office,
 and

and therefore require no clerk (*a*). He acted, after the statute passed, merely as clerk de facto. But, further, *Williams* held no office at all. It was not a chartered office. It was only an employment in which the magistrates required his services. They might, at any time, have employed another person, or have acted without a clerk. In *Rex v. The Mayor, &c., of Bridgewater* (*b*) the office of justices' clerk was an incident to that of town clerk; and the town clerk was in office as such; and stat. 5 & 6 *W. 4. c. 76.* in effect abolished the ancient office of town clerk, so that the compensation was, properly speaking, granted for the loss of the office of town clerk. *Coleridge J.* there said, "The town clerk is named in the charter; and this office seems to have been held during good behaviour: it is abolished by the act; and the present office of town clerk is totally new." *Ex parte Harvey* (*c*) is in point, and shews that this is not an office for which compensation can be claimed. The entries in the corporation books prove that the payments to *J. Williams* were merely voluntary.

1839.

The QUEEN
against
The
Mayor, &c., of
CARDIFF.

E. V. Williams, contra. It is clear that the corporation appointed and paid the justices' clerk. The entries in the corporation books treat the payments to him as "salary;" they are from the corporation funds, and are reduced when those funds are distressed. The corporation cannot now treat this as an informal appointment, in order to evade the act. But he was strictly in office. It is not necessary that the office should be a chartered one. Wherever the charter created an office which implied the existence of a subaltern, there the office of

(a) See *Regina v. The Corporation of Poole*, 7 *A. & E.* 730.

(b) 6 *A. & E.* 339. (c) 7 *A. & E.* 739. *S. C. 3 N. & P.* 159.

the

1839.
 ———
 The QUEEN
 against
 The
 Mayor, &c., of
 CARMARTHEN.

the subaltern was impliedly created by the charter. Thus a charter granting quarter sessions would impliedly create the office of clerk of the peace: a grant to a borough to hold pleas carries with it the power to have officers, *Com. Dig. Courts*, (P. 4.). It must be presumed that the justices would require a clerk. In *Rex v. The Mayor, &c., of Bridgewater* (a) it was said that the word "office," in stat. 5 & 6 W. 4. c. 76. s. 66., was to be understood in a larger sense than that of an office strictly legal. Of the three Judges there present, two decided on the ground that the applicant, as clerk to the justices, held an office. The third, *Coleridge J.*, did indeed take the ground here pointed out on the other side; he added, however, "But, again, I agree with the rest of the Court that it is not necessary that there should be an office, strictly speaking. Looking at the words of sect. 102, where the words are "office of clerk to the justices," it is clear that the word is not used there in the strict sense in which we find it employed in our law books, but in the general and liberal sense of a place to which duties and profits are attached." [*Coleridge J.* Under sect. 102, it seems that the justices must jointly appoint their clerk: it is not as formerly, when each might appoint his own.] In the present case, the clerk appears to have been always clerk to the whole body of justices. He clearly held during good behaviour. It is said that he was not "removed" from his office, nor "not reappointed;" if that be correct, his office was "abolished;" the case falls under one or other of the clauses of sect. 66. The applicant in *Ex parte Harvey* (b) was merely deputy to the chamberlain, a recognised officer.

(a) 6 A. & E. 339.

(b) 7 A. & E. 739.

LORD DENMAN C. J. I think the Lords of the Treasury were right. The case cannot be distinguished from *Rex v. The Mayor, &c. of Bridgewater* (a); but it has been properly distinguished from *Ex parte Harvey* (b). The applicant was appointed and uniformly paid by the corporation, and recognised as their officer.

1839.

The QUEEN
against
The
Mayor, &c., of
CARMARTHEN.

PATTESON J. I cannot distinguish this case from *Rex v. The Mayor, &c., of Bridgewater* (a). This was an office, though not a chartered office.

WILLIAMS and COLERIDGE, Js. concurred.

Rule absolute.

(a) 6 A. & E. 339.

(b) 7 A. & E. 739.

The QUEEN *against* the Vestrymen and Churchwardens of St. PANCRAS, MIDDLESEX.

Monday,
November 4th.

SIR J. CAMPBELL, Attorney General, in last Trinity term (June 6th), obtained a rule nisi for a mandamus, commanding the above parties forthwith to appoint a day for holding a meeting of the parishioners

On the nomination of the eight inspectors to act in the election of vestrymen under stat. 1 & 2 W. 4. c. 60., the de-

cision of the chairman, on a shew of hands, that one or the other party has a majority, is not conclusive, but he is bound, on requisition from either side, to take steps for ascertaining the numbers.

Quære, whether the proper course, on such requisition, be to divide the meeting or at once to take a poll. Semble, that under stat. 1 & 2 W. 4. c. 60. s. 14. a division is proper.

The mere existence of party feeling in the chairman is not sufficient ground for impeaching a nomination of inspectors under the statute: but, if, after improperly refusing to ascertain the numbers voting, he has declared certain persons to be the inspectors nominated by the meeting, and the election of vestrymen has thereupon taken place, the Court will grant a mandamus for a new election, although a considerable time has elapsed. *Ex. gr.*: Where the election took place, May 6th, and a mandamus was moved for on June 6th, and cause was shewn November 4th, the rule was made absolute, November 21st.

If four inspectors have been improperly declared to be nominated by the meeting, such mandamus will be granted, although the other four inspectors were duly nominated by the churchwardens, and officiated at the election.

for

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAE.

for the election of vestrymen and auditors of accounts for the said parish for the year ending in *May* 1840, pursuant to stat. 1 & 2 *W.* 4. c. 60., within a reasonable time &c., and so that twenty-one days' notice might be given, according to the act; and commanding the churchwardens to cause such notice, signed &c., to be affixed &c.

It appeared, by the affidavits in support of the rule, that a meeting was held at the vestry-rooms of *St. Pancras* on *May* 6th, 1839, on notice from the churchwardens, for the election of vestrymen and auditors according to Sir *J. Hobhouse's* act, 1 & 2 *W.* 4. c. 60., by which this parish is regulated. The churchwardens acted as chairman; and they nominated four persons to be the inspectors of votes at such election, pursuant to the act (a). Four persons were then proposed, to be

(a) Stat. 1 & 2 *W.* 4. c. 60. s. 14. enacts, "That on the day of annual election for vestrymen and auditors in any parish adopting this act, each parishioner then rated, and having been rated to the relief of the poor one year, desirous of voting, do meet at the place appointed for such election, then and there to nominate eight rate payers of the said parish as fit and proper persons to be inspectors of votes, four of such eight to be nominated by the churchwardens, and the other four to be nominated by the meeting; and after such nomination the said parishioners shall elect such parishioners duly qualified as may be there proposed for the offices of vestrymen and auditors; and the chairman shall at such meeting declare the names of the parishioners who have been elected by a majority of votes at such meeting."

By sects. 15 and 16, any five rate-payers may then and there demand a poll for the election of vestrymen and auditors, which shall be taken by ballot, the inspectors receiving the balloting lists, and depositing them in the manner pointed out by sect. 16.

By sect. 17, after the close of the ballot the inspectors are to examine the votes, and continue the examination (for a limited number of days, if necessary,) till they shall have decided on the persons, duly qualified according to the act, who shall have been chosen to fill the offices.

By sect. 18, if votes are equal, the inspectors shall decide by lot.

By sect. 20, the inspectors, immediately after they have decided, shall deliver to the churchwardens a list of the persons chosen &c.

Sect. 21 imposes penalties on inspectors wilfully making a false return.
nominated

nominated as the remaining inspectors; and an amendment was moved, proposing four others. The churchwardens called for a shew of hands upon the amendment; and it was immediately taken. The churchwardens declared the amendment carried; but some of the present deponents alleged in their affidavits that, to their belief, the majority was against the amendment. Many of the rate-payers at the meeting disputed the decision of the churchwardens, and called upon them to divide the meeting on the amendment, and count the numbers; and some made this demand in writing; but the churchwardens refused to comply with it, and proceeded to the election, several of the vestrymen protesting against further proceedings being taken till after a division. The inspectors nominated, and declared to be elected, as above-mentioned, officiated at the election. One of the inspectors nominated by the churchwardens was elected an auditor of accounts, and one of those named in the amendment was elected a vestryman. The affidavits stated that all the eight persons nominated and elected inspectors were "well-known partizans in the said parish, of the same principles and party with" the churchwardens: and some of the deponents alleged their belief that the churchwardens had declared the amendment carried solely in consequence of the persons named in it being such partizans and of such principles, and not because they believed that there was a majority for the amendment. The affidavits also cited language said to have been used on several occasions by one of the churchwardens, confirmatory of the above imputation as to his motives. And it was stated that, on the shew of hands, many persons held up both hands for the amendment.

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAZ.

1839.

The QUEEN
against
The Vestry-
men, &c., of
ST. PANCRAE.

In opposition to the rule, the churchwardens made affidavit that, at the election of vestrymen and auditors in 1838, a division was called for, and had, but that they (acting then as chairman) at first refused to count the numbers: that the rooms are very ill adapted for such proceeding, as there is not space enough to count within the vestry-room, nor is there any second room in the building large enough for either party to retire to, and the party retiring is therefore compelled to occupy several small rooms &c. (describing the condition of the premises in this respect), "from which circumstance, as well as from the circumstance that there are two distinct entrances" &c. (describing the entrances), "it is, as deponents believe, impossible, without closing the doors, to prevent persons coming into the building from being counted into or with that party which may happen to retire from the great room, although such persons may, in fact, wish to vote for the other party:" that the numbers were ultimately counted on the last mentioned occasion: that, to the belief of these deponents, many persons entered and left the building during the division, and by reason of this circumstance, and the construction of the rooms, voters were improperly counted and omitted. That on the meeting of *May* 6th, 1839, about 600 persons attended the election: that the deponents were on a platform four feet high, from which, at the shew of hands, they saw all persons present and holding up their hands, unless any kept out of sight intentionally, and knowing that they might be within sight: that the persons who attended the meeting, on entering the rooms, with very few exceptions, went to, and occupied, one or the other end of the rooms (oblong ones communicating by folding doors, which

which were removed for the occasion), accordingly as they were for or against a particular party, so that there was very nearly a perfect division formed by the parties themselves; and that, from this circumstance, the deponents were well able to judge of the numbers on each side: that, when the question was put upon the nomination of inspectors, there was a large majority in favour of the amendment; and that the deponents came to this conclusion, not merely on the shew of hands, but from the circumstance of the parties having divided themselves as before described, and the greater number being on the side where the generality of persons supported the amendment: that the party on that side, though more crowded than the party opposite, reached beyond the centre of the room; and that among them only three or four held up their hands against the amendment, while a much greater number on the opposite side of the room voted for it: that the deponents refused to order a further division, not from any corrupt motive, but because they were convinced that a large majority (five to three, as they believed) were for the amendment, and there were no convenient means of counting the voters accurately on a division, and the deponents wished to avoid the trick and unfairness which they believed to have been practised at the nomination in the preceding year: they likewise stated, as reasons, that there was great noise and confusion, and much business to be done at the meeting. The affidavits also contained statements contradictory of those on the other side as to the political conduct and connections of some of the parties elected: and they explained and partly denied the language imputed to one of the churchwardens. Many other affidavits were put in, stating

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAZ.

1839.

The QUEEN
against
The Vestry-
men, &c., of
ST. PANCRAZ.

that the majority, on *May* 6th, 1839, was in favour of the amendment, and alleging (where reasons were added) the same grounds for such conclusion as those stated by the churchwardens. And they went largely into other details. The eight inspectors made an affidavit as to their own conduct on the election, and the results of the poll.

Sir *F. Pollock*, *Prendergast*, and *Barstow*, now shewed cause (a). This is an attempt to set aside an election made in last *May*; if successful, it will annul every thing done by the vestrymen since, as the making of rates, and the appointment of directors of the poor. The motion calls for a mandamus to elect vestrymen and auditors; but it is not disputed that there has been an election *de facto* of vestrymen and auditors, by a majority of rate-payers. To ground such a motion, that election *de facto* ought to be impeached. Had no inspectors been nominated, the election would be void: but eight were appointed in fact; and as to four the appointment is clearly good. The election of vestrymen, therefore, is not void, more than if the last four had been persons clearly well nominated, but who would not attend. As to the remaining four, it is objected that the churchwardens would not allow the meeting to divide on their nomination; but a division could not be insisted upon. In the case of an election, if a shew of hands takes place, and the parishioners are not satisfied with the judgment of the returning officer, they may demand a poll; but there is no intermediate step. [Lord *Denman* C. J. There must be *bona fides* in the return-

(a) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

ing officer. Suppose he thought proper to say that one hand only was a majority.] He might be punished by a criminal information; but the known remedy, in every case of election, is to demand a poll; and there is no other. Here, however, by stat. 1 & 2 W. 4. c. 60. s. 14., the inspectors are to be "nominated," not elected, and they are to conduct the *election* of vestrymen, in the manner directed by the statute: there is, therefore, no poll. If there were to be an election of inspectors, the proceedings might be lengthened to a degree never contemplated by the statute. The intention is that, on the nomination of inspectors, the chairman shall be trusted to decide as to the majority. If he determines *bonâ fide*, even though erroneously, the decision cannot be impeached; if *malâ fide*, he is punishable, but the subsequent election is not defeated. At all events, there is no warrant for the proposition that, if four legally appointed inspectors act, the election shall be avoided by defect of title in the other four. It may be asked, further, what right the chairman has to lock the doors of the vestry room for the purpose of a division; and a division with open doors would be a poll. In point of fact it is clear, in this case, that the majority was on the side for which the churchwardens declared it. It is said that, on the poll for vestrymen and auditors, some of the inspectors were themselves elected; but there is no ground on which this fact can vitiate the election.

Sir *J. Campbell*, Attorney General, and *Pcacock*, *contra*. As to the mode of appointing inspectors, stat. 1 & 2 W. 4. c. 60. s. 14. requires that the parishioners shall meet to nominate inspectors, and that four

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAZ.

1899.

—
The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAZ.

shall be nominated “by the meeting.” It is contended, on the other side, that there can be no middle course between a choice by shew of hands and a poll; but the words just cited introduce such a course, for “the meeting” is the majority of the persons actually present when the names are proposed, and that cannot be ascertained without using the ordinary means, namely, closing the doors and dividing. [*Patteson J.* Then either the persons not present at the division must be excluded from voting for vestrymen and auditors (unless a poll takes place), or “meeting” has two different senses in sect. 14.] The meeting, to nominate inspectors, is the assemblage of persons present when the vote for that purpose is taken: afterwards the “parishioners” are to elect vestrymen and auditors; and for that election the doors would be thrown open, and the chairman would “at such meeting,” that is, the meeting of parishioners already present or who came in to elect these officers, “declare the names of the parishioners who have been elected by a majority of votes at such meeting.” In the case of vestrymen and auditors, sect. 15 enacts that, on the demand of any five rate-payers, a poll *shall* be taken; there is no such provision as to inspectors. But a shew of hands, in their case, could not lead to any certain conclusion, as the present affidavits prove; no course remains, therefore, but a division. For to say that whatever the chairman pronounces on a shew of hands must be decisive is placing the whole election at his disposal. Then, if the eight inspectors were not properly nominated, the election could not be valid. This is evident from the nature of their functions, and from the terms of sect. 14, which makes the nomination

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tion of the eight inspectors a condition precedent to the election. [Lord Denman C. J. We will look into the statements on each side. If there was mala fides throughout, the election cannot stand, because, if the inspectors were improperly appointed, nothing was done. But the rash expression of a chairman who happens to be a party-man ought not to decide the case.]

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRA'S.

Cur. adv. vult.

LORD DENMAN C. J., in this term, November 21st, delivered the judgment of the Court.

This was an application to compel proceeding to a new election of vestrymen, on the ground that the election which took place in May was a nullity, the sense of the meeting in respect of the nomination of inspectors not having been duly taken by the churchwardens who presided there.

The act 1 & 2 W. 4. requires, as preliminary to the election of vestrymen, the nomination of eight inspectors, four by the churchwardens, four by the meeting. On this occasion the churchwardens, having nominated their four, called on the meeting to nominate four others. Two lists of four were accordingly prepared by the two parties; and, a shew of hands having been required on both successively, the churchwardens expressed their decision in favour of one set; upon which the friends of the other demanded a division of the voters present, that the numbers appearing on each side might be counted. This course the churchwardens refused to take, though frequently pressed to do so, and declared the election carried by the shew of hands as at first.

The affidavits in support of the rule went into a vast deal of extraneous matter, not enough connected with

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAAS.

our immediate subject to require notice here. Expressions of the more active churchwarden were deposed to, shewing a determination to favour his own party, which were by no means satisfactorily explained away by himself. The defeated party claimed the majority of votes at the meeting; but the other party were in much greater numbers, to their confident belief the other way. In arguing against the rule many propositions were laid down which appear to us wholly untenable. It was boldly urged that the decision of a returning officer is binding and conclusive however partial and unfair, *and in whatever degree his partiality and unfairness may have affected the result of the election.* What he chooses to declare (it was said) must stand, though his misconduct may expose him to punishment. The claim of such a privilege refutes itself. Mere feelings of partiality in a returning officer towards the successful candidate cannot, indeed, be sufficient to vacate the election conducted fairly and with regularity. But, if proper means are taken for challenging an election good in form, but reasonably suspected to be the result of manœuvring practised by persons in authority for selfish or party purposes, we cannot be bound by a result so brought about, and cannot refuse to put the facts into a course of inquiry: and the temporary inconvenience, though much to be lamented, that may be produced by changes and new elections is an evil infinitely less than the encouragement which would otherwise be afforded by this Court to an arbitrary and corrupt abuse of lawful power. The difficulty, or impossibility, rather, of complying now with the act of parliament on account of the lapse of time was not very strongly pressed. For, though the election is fixed to
take

take place in *May*, yet the well known practice of this Court is to set aside vicious proceedings held at the regular period, and direct others in their place afterwards. It would be too great a triumph for injustice if we should enable it to postpone for ever the performance of a plain duty only because it had done wrong at the right season.

Then the mode of nominating inspectors required by the act was described as not essential but directory, so that non-compliance with its forms would not vitiate an election *de facto*. We need say no more in answer to this doctrine than that the powers granted by the act to the inspectors place the fate of the election itself completely in their hands, so that every thing depends on their being faithfully nominated.

Another argument required much more consideration. The returning officers say that those who objected to their proceeding did so on wrong grounds, and made a wrong demand upon them. They contend that only two modes of election are known to the common law, by shew of hands and by a poll; and that the objectors who complained that the decision on the shew of hands was incorrect, ought to have demanded a poll, not that the meeting should be divided and the number on each side counted; an intermediate course unknown to the ordinary practice, and which no returning officer could be bound to introduce. On this point the learned counsel in support of the rule, referring to the fourteenth section of the act, asserted that a third mode of election or rather appointment is thereby introduced; that the *nomination* of inspectors is to be made at the meeting, that is, by such as happen to be present at the meeting; that, therefore, where the shew of hands is
disputed,

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAZ.

1839.
 ———
 The QUEEN
against
 The Vestry-
 men, &c., of
 St. PANCRAZ.

disputed, those present at the meeting must be divided, and those giving their votes on either side counted by the officer; that this mode of ascertaining a majority is practised in both houses of parliament; and that a poll, by admitting all parishioners to come in and vote, would be inconsistent with the act which refers the decision to that meeting. (His Lordship here read sect. 14 of stat. 1 & 2 W. 4. c. 60.)

We are much struck by these observations, and think the reasoning at least plausible. The business of nominating inspectors is apparently intended to be begun and finished at that meeting, some reasonable precaution being taken that none but rate-payers are present; and the election of vestrymen is to follow without more delay: if the shew of hands and poll were the method, the preliminary process itself might be indefinitely prolonged; for the common law right on that subject is generally understood to be that any voter, however satisfied with the correctness of the declaration on the shew of hands, yet may appeal from it to the whole body of electors (*a*), and keep a poll open till all have had the opportunity of attending to record their suffrages. Now, if the churchwardens were bound to declare the nomination of the four inspectors as made by that meeting, they had no other means of coming to a just conclusion than by dividing and counting those present, as they were required to do, supposing any doubt to exist on which side the majority appeared.

But we do not deem it absolutely necessary for our present decision to lay down any rule on the fourteenth section. For, whether that construction prevail, or the

(*a*) *Campbell v. Maund*, 5 A. & E. 865.; *Regina v. The Rector of Lambeth*, 8 A. & E. 356.

more ordinary method be adopted, the shew of hands ought to be fairly taken. Was it so taken? A strong doubt was expressed at the time whether the churchwardens had not made an erroneous report of the numbers on each side: it is even now sworn, by several who were present, that the majority was the other way; nothing could be more reasonable than the demand that the numbers should divide and be counted. If this had been done with closed doors, certainty would have been obtained in a few minutes. But the churchwardens took upon themselves to declare the respective numbers in favour of that party to which they avowedly belong, at the very moment when they refused to ascertain the truth. The affidavits now produced by them and many others, of their belief respecting this doubtful matter, do not meet the just complaint that they might have spoken with perfect knowledge; and that belief is, indeed, founded on remarks and reasonings which are detailed, and are very far from being conclusive.

These considerations have brought us to the opinion that the mandamus ought to issue.

Rule absolute (a).

(a) See *Rex v. The Rector, &c., of Birmingham*, 7 A. & E. 254.

The rule in the present case was drawn up as follows. "Upon reading," &c., "It is ordered that a writ of mandamus issue, directed to the vestrymen and churchwardens of the parish of *St. Pancras*, in the county of *Middlesex*, commanding the said vestrymen forthwith to appoint a day for holding a meeting of the parishioners of the said parish, for the election of vestrymen and auditors of accounts for the said parish for the year ending in the month of *May* 1840, pursuant to the provisions of the statute, &c. (1 & 2 W. 4. c. 60.), "within a reasonable time, and so that notice of such election may be given pursuant to, and in the manner directed by, the said statute, on some *Sunday*," &c., "and commanding the said churchwardens to cause notice of such election, signed by them the said churchwardens, to be affixed to the principal doors of every church and chapel of the said parish, and at other usual places, in the terms prescribed by, and pursuant to, the said act of parliament." The mandamus

issued:

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAS.

1839.

The QUEEN
against
The Vestry-
men, &c., of
St. PANCRAE.

issued: and in *Hilary* term, 1840 (*January* 11th), a rule was obtained, calling on the prosecutors to shew cause why the writ should not be quashed or amended. The grounds were, that the writ varied from the rule, inasmuch as it was addressed to the *vestry* (not *vestrymen*) and churchwardens; and, after following the terms of the rule in other respects to the conclusion, added "And that you the said vestry and churchwardens, and every of you do every act necessary to be done by you or any of you respectively, in order to the appointment of such day of meeting for the said election, and for the commencement of such election, and for giving notice thereof as aforesaid, according to your authority in that behalf respectively, as such vestry and churchwardens; or that you shew cause" &c. It was also suggested that, if any such conclusion was proper, it should have directed the vestrymen, after taking the preliminary steps, to proceed and elect according to the statute. Cause was shewn on the last day of the same term, *January* 31st, when the prosecutors declined amending, and the Court (Lord Denman C. J., *Little* and *Coleridge* Js.) discharged the rule.

Tuesday,
November 5th.

SHORT *against* KALLOWAY.

Plaintiff declared in covenant, reciting that P. had leased a house to defendant, and defendant had by the lease covenanted to repair; that

THIS was an action of covenant, tried before Lord Denman C. J., at the *London* sittings after last term. A verdict was found for the plaintiff, and leave reserved to plaintiff and defendant to move, the latter for a nonsuit, the former for an increase of damages.

defendant had assigned to plaintiff, with covenant that defendant had repaired according to the terms of the lease; breach, non-repair, alleging, by way of aggravation, that plaintiff had assigned to C. with a covenant that the covenants in the lease had been performed; that C. had sued plaintiff for the non-performance of the covenants in the lease, whereby plaintiff had to pay C. 120*l.* to settle the action, besides the expenses of defending it. Plea, payment of 5*l.* into Court, and no damages *ultra*. Replication, damages *ultra*. Verdict for 45*l.* damages, beyond the 5*l.*

On motion by defendant for a new trial, on the ground that plaintiff was not liable to C. except for his own acts, and therefore could not charge defendant with the 120*l.* or 119*l.*, the Court refused a rule, the verdict being general, and not shewing that the jury had allowed damages in respect of C.'s action, and it being defendant's duty to point out at the trial the limitation contended for.

The Court also refused to increase the damages by 119*l.*, which was proved to have been expended in defending the action against C., since the damages recovered by C. exceeded the sum given in the present action, and must therefore in part have been attributable to plaintiff's own acts; so that the costs of defence did not appear to be the necessary consequence of defendant's breach of covenant.

Sir

Sir *F. Pollock* now moved accordingly for the plaintiff, and *Platt* for the defendant (a). The nature of the case will sufficiently appear from the judgment.

Cur. adv. vult.

1839.

SHORT
against
KALLOWAY.

Lord DENMAN C. J., in this term (*November 21st*), delivered the judgment of the Court.

The declaration stated that, in 1833, in a lease from *Elizabeth Parnell* to the defendant, the latter covenanted to put a house and premises into perfect repair within six months, and, during the term, to keep them well and sufficiently repaired, subject to a proviso for forfeiture of the term on breach of any covenant: and that, in 1836, defendant assigned to plaintiff, with a covenant that the lease was then a good and subsisting lease, that it had not become void or voidable, and that all the covenants had been performed. The breach was, that the covenants had been broken (the particulars were described), whereby the lease had become voidable, and plaintiff had been obliged to pay one *Clark*, to whom he had assigned the lease, 120*l.*, to settle an action brought by *Clark* against plaintiff, who had covenanted (relying on defendant's covenant) that the covenants were unbroken, and the lease in full force; and the additional sum of 119*l.* was paid by him in the course of his defence to *Clark's* action.

The defendant pleaded payment of 5*l.* into Court, and that plaintiff had sustained no damage beyond that sum: on which alone issue was joined.

On the trial, damage to a greater amount, 50*l.*, was proved to have been sustained by the breach of covenant

(a) Before Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge* Js.

1839.

—
 SHORT
 against
 KALLOWAY.

to repair. It was further proved that the plaintiff had incurred 119*l.* in the defence of *Clark's* action against him, which plaintiff claimed to add to the 50*l.*

On the other hand, it was contended that the covenant made by the plaintiff with *Clark*, which was produced, limited his responsibility to his own acts and defaults; and that he was not liable on that covenant to indemnify against the omissions of preceding tenants (a).

At the close of the trial, I gave both parties leave to move: the plaintiff for an increase of damages, and the defendant to enter a nonsuit; the latter, without adverting to the defendant's having paid money into Court and admitting on the record all the plaintiff's allegations except the amount of damages. Whence it follows, that whatever loss the defendant may have sustained must be redressed, if it can be redressed at all, by means of a new trial. He must abide the consequences of his own neglect to point out, on the trial, the limitation which would have protected him against the excess. It is his own fault that we cannot now know for what the jury assessed their damages; nor can that be ascertained without a delay and increase of expense to which we could not properly expose the parties at the defendant's request.

If, indeed, it followed from this state of the pleadings that the sum of 119*l.* expended by the plaintiff in defending himself against his assignee must be added to the damage occasioned by the bad state of repair, we might, perhaps, justifiably exercise our discretion by sending the case to a second enquiry. But that is

(a) On this point, the defendant's counsel referred to *Foord v. Wilson*, 8 Taunt. 543. S. C. 2 B. Moore, 592.; and *Nind v. Marshall*, 1 Br. & B. 319. S. C. 3 B. Moore, 793.

clearly otherwise, as that head of damage appears on the record only by way of aggravation: and no person has a right to inflame his own account against another by incurring additional expence in the unrighteous resistance to an action which he cannot defend (*a*). The circumstance relied on, that the damages were unliquidated, makes no difference in this case, in which the sum recovered by *Clark*, viz. 120*l.*, exceeded the damages for which the jury have found the defendant answerable, and must, as to such excess, be attributed to damages arising from the plaintiff's own acts; from which circumstances it clearly appears that the defence of the action brought by *Clark*, and the costs of 119*l.*, were not the necessary consequence of the defendant's breach of contract.

Both rules must therefore be refused.

Rules refused.

(*a*) On this point, the counsel for the plaintiff referred to *Neale v. Wyllie*, 3 B. & C. 533.; *Pennell v. Woodburn*, 7 C. & P. 117.; and *Lewis v. Peake*, 7 Taunt. 153. See *Smith v. Compton*, 3 B. & Ad. 407.

BYROM *against* THOMPSON.

Wednesday,
November 6th.

ASSUMPSIT. The first count stated that defendant, on 2d November 1837, made his promissory note in writing, and delivered it to plaintiff, and thereby promised to pay to plaintiff, *or order*, on demand, 525*l.* with interest; that payment was demanded on 11th

Defendant gave plaintiff a promissory note, without the words "or order." Six months afterwards plaintiff mentioned the omission to

defendant, who answered that the omission was his, the defendant's, own, and consented that the words should be inserted, which was done accordingly. The bill was not re-stamped.

The bill having been declared on, as altered, and issue joined on a plea denying the making of the note: Held, that, on the above evidence, the jury were justified in finding for plaintiff, as it appeared that the alteration was made only in furtherance of the original intention of the parties, and to correct a mistake, in which case no new stamp was requisite.

December

1839.

SHORT
against
KALLOWAY.

1839. *December* 1838, but the note was not paid. There were also other counts. First plea, as to the first count, that defendant did not make the said promissory note in the first count mentioned, in manner &c. Issues on this, and on other pleas not material here.

BYRON
against
THOMPSON.

On the trial before Lord *Denman* C. J., at the *London* sittings after last *Trinity* term, the plaintiff produced a promissory note answering to the description in the count; but it appeared that the words "or order" were interlined. The plaintiff proved that the note had originally been made without the words "or order:" that, at some time after 10th *April* 1838, the omission was complained of to the defendant, who thereupon said that the omission was his (the defendant's) own, and consented to the insertion of the words, which was accordingly made. It was objected for the defendant that a new stamp was necessary, by reason of the alteration. Verdict for plaintiff on all the issues; leave being reserved to move to enter a verdict for defendant on the issue on the first plea.

Alexander now moved accordingly. A new stamp was necessary, as the nature and effect of the note were altered by the interlineation. The cases in point are collected in *Selwyn's Nisi Prius* (a), and in *Chitty on Bills* (b). In *Knill v. Williams* (c) a promissory note had been originally drawn "for value received;" and had afterwards, by consent of parties, been altered by adding the words "for the good will of the lease and trade of Mr. F. Knill deceased." It was held that a

(a) Vol. i. p. 315. &c. (9th ed.).

(b) Page 184, &c. (9th ed. by *Chitty* and *Hulme*, 1840). And see p. 531.

(c) 10 *East*, 431.

new stamp was required (a). The alteration here is much more important. In that case *Le Blanc J.* seems not to be satisfied with his own decision in *Kershaw v. Cox* (b), where it was held that the insertion of the words "or order," by consent of the parties, did not make a new stamp necessary, the alteration being, on the evidence, merely, the correction of a mistake. In *Knight v. Clements* (c) it was held that the plaintiff was bound to give evidence explaining alterations apparent on the face of a bill, and shewing that they were made at such time, and under such circumstances, as not to create a variance; the mere production of the altered bill furnishing no ground on which the jury could form an opinion as to that point. The consent of parties to the alteration will not, of itself, cure the objection on the stamp; *Clerk v. Blackstock* (d).

1839.

 BYRON
 against
 THOMPSON.

PARTESON J. The only question is, whether the alteration here was made in pursuance of the original intention of the parties. That is the principle of *Kershaw v. Cox* (b). *Knight v. Clements* (c) shews only that it lies on the party who seeks to enforce the instrument to prove under what circumstances the alteration took place: the attempt there was to leave the jury to conjecture such circumstances from the mere inspection of the bill. Here the defendant says that the omission was his own; which shews that the alteration was made merely to correct a mistake: it is therefore

(a) The note was there declared on in its altered form. As to the method of raising objections, in pleading, on the alteration of an instrument, since the New Rules, see *Hemming v. Trencery*, 9 A. & E. 926.

(b) 3 Esp. N. P. C. 246.

(c) 8 A. & E. 215.

(d) *Holt's N. P. C.* 474.

1839.

BYROM
against
THOMPSON.

exactly the case of *Kershaw v. Cox (a)*; and the verdict is right.

Lord DENMAN C. J., WILLIAMS, and COLERIDGE, Js., concurred.

Rule refused.

(a) 3 *Esp. N. P. C.* 246.

Wednesday,
November 6th.

WOOD *against* MANLEY.

Goods which were upon plaintiff's land were sold to defendant; by the conditions of sale, to which plaintiff was a party, the buyer was to be allowed to enter and take the goods. Held that, after the sale, plaintiff could not countermand the licence. And, defendant having entered to take, and plaintiff having brought trespass, and defendant having pleaded leave and licence and a peaceable entry to take, to which plaintiff replied *de injuriâ*: Held that defendant was entitled to the verdict, though it appeared that plaintiff had, between the sale and the entry, locked the gates and forbidden defendant to enter, and defendant had broken down the gates and entered to take the goods.

TRESPASS for breaking and entering plaintiff's close.

Plea (besides others not material here), as to entering the close, that defendant, before the time when &c., was lawfully possessed of a large quantity of hay, which was upon plaintiff's close in which &c., and that defendant, at the times when &c., by leave and licence of the plaintiff to him for that purpose first given and granted, peaceably entered the close, to carry off the said hay, and did then and there peaceably take his said hay from and out of the said close, as he lawfully &c., which are the said alleged trespasses &c. Replication, *de injuriâ*.

On the trial, before *Erskine J.*, at the last *Somersetshire* assizes, it appeared that the plaintiff was tenant of a farm, including the locus in quo; and that, his landlord having distrained on him for rent, the goods seized, comprehending the hay mentioned in the plea, were sold on the premises; the conditions of the sale being, that the purchasers might let the hay remain on the premises till the *Lady-day* following (1838), and enter on the

premises

premises in the mean while, as often as they pleased, to remove it. The defendant purchased the hay at the sale : and evidence was given to shew that the plaintiff was a party to these conditions. After the sale, on 26th *January* 1838, plaintiff served upon defendant a written notice not to enter or commit any trespass on his, the plaintiff's, premises. In *February* following, defendant served plaintiff with a written demand to deliver up the hay, or to suffer him, defendant, to have access thereto and carry it away ; threatening an action in default thereof. The plaintiff, however, locked up the gate leading to the locus in quo, where the hay was ; and the defendant, on 1st *March* 1838, broke the gate open, entered the close, and carried away the hay. The learned Judge told the jury that, if the plaintiff assented to the conditions of sale at the time of the sale, this amounted to a licence to enter and take the goods, which licence was not revocable : and he therefore directed them to find on this issue for the defendant, if they thought the plaintiff had so assented. Verdict for the defendant.

1839.

Wood
against
MANLEY.

Crowder now moved for a new trial, on the ground of misdirection. The learned Judge appears to have considered that this case fell within the principle laid down in *Winter v. Brockwell* (a), that a licence executed cannot be revoked. There the execution of the licence took place by the defendant building in pursuance of the plaintiff's permission ; so that the defendant had incurred an expence, upon the faith of the licence, in doing the very thing which was licensed : and the action

(a) 8 *East*, 308.

1839.

Wood
against
MANLEY.

was for the thing so done. But this is not the case of a licence executed before revocation: the plaintiff revoked the permission before the defendant acted upon it at all. On these pleadings, the only question is, whether the act done by the plaintiff was licensed by the defendant. It may be that the defendant was entitled to bring trover, or perhaps to sue for breach of the conditions: but the licence was revoked before it was executed. [Lord *Denman* C. J. If a man buys a loaf, and part of the bargain is, that he shall leave it at the baker's shop, and call for it, can the baker prevent his entering the shop to take the loaf?] Suppose a party agrees to sell merchandize; if he afterwards refuse to sell, the buyer cannot take it. [Lord *Denman*, C. J. But here the sale was completed.] The ruling of the learned Judge, if correct, would shew that every case of contract created an irrevocable licence. [Lord *Denman* C. J. Here the question is on the fact of the licence.] The revocation of a licence need not be specially replied: it may be shewn under a traverse of the licence. Besides, the replication here puts the whole plea in issue; and the plea alleges a quiet entry, which is negatived by the gate being broken. A right of way may, perhaps, in some cases be enforced by violence, but not a licence. [*Patteson* J. referred to *Tayler v. Waters* (a).] The question there was, whether a licence to use real property could be given without writing; and it was decided that it could. *Liggins v. Inge* (b) is to the same effect.

(a) 7 *Taunt.* 374.

(b) 7 *Bing.* 682. See *Bridges v. Blanchard*, 1 *A. & E.* 536.

LORD DENMAN C. J. Mr. *Crowder's* argument goes this length;—that, if I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a licence thus given and acted upon is irrevocable.

1839.

WOOD
against
MANLEY.

PATTESON J. *Tayler v. Waters (a)* shews that a licence to use a seat at the opera house, paid for and acted upon by sitting there, cannot be countermanded. Here the conditions of sale, to which the plaintiff is a party, are that any one who buys shall be at liberty to enter and take. A person does buy: part of his understanding is that he is to be allowed to enter and take. The licence is therefore so far executed as to be irrevocable equally with that in *Tayler v. Waters (a)*. The case put by Mr. *Crowder* is different. I do not say that a mere purchase will give a licence: but here the licence is part of the very contract.

WILLIAMS J. The plaintiff, having assented to the terms of the contract, put himself into a situation from which he could not withdraw.

COLERIDGE J. The pleadings raise the issue whether, when the act complained of was done, the leave and licence existed: it did exist if it was irrevocable; and I think it was irrevocable. Although no one of the cases referred to is exactly the same as this, yet all proceed on the principle that a man, who, by consenting

(a) 7 Taunt. 374.

1839.

Wood
against
MANLEY.

to certain terms, induces another to do an act, shall not afterwards withdraw from those terms.

Rule refused.

Wednesday,
November 6th.

SIBBALD *against* RODERICK, JONES, and EVANS.

Where some poor rates had not been duly published on the *Sunday* following the allowance, according to stat. 17 G. 2. c. 3. s. 1., and a warrant of distress issued for a single sum, made up of these rates and of others which were regular: Held, that the warrant was wholly bad, and that replevin lay for a distress taken under it.

REPLEVIN for taking cattle.

Avowry by *Evans*, as overseer of the parish of *Llanbadarnodwyn*, otherwise *Llanbadarnodin*, and cognisance by the other defendants as bailiffs of *Evans*, justifying the taking, under stat. 43 *Eliz. c. 2. s. 4.*

Plea in bar, de injuriâ.

On the trial, before *Gurney B.*, at the last *Cardigan-shire* assizes, the defendants proved that the plaintiff appeared on summons before two justices, to shew cause why he did not pay poor rates, and was ordered thereupon to pay 40*l.* 6*s.* 8*d.*, the amount of certain rates which the justices considered to be legal. Upon his refusal to pay, a warrant issued under the hands and seals of the two justices, addressed to the parish officers, reciting that, "by certain rates and assessments made, assessed, allowed, and published, according to the statutes in that case" &c., the plaintiff was duly rated to the relief of the poor "in the sum of 40*l.* 6*s.* 8*d.*," "that the said sum of 40*l.* 6*s.* 8*d.*" had been demanded of him, and he refused to pay it; and that he had appeared on summons, and shewed no cause for not paying &c.; the warrant then required the officers to distrain upon his goods, and, if the said sum, with charges &c., were not paid in four days after the distress, to sell, and, out of the money thence arising, to "detain the said sum of 40*l.* 6*s.* 8*d.*," with charges &c.

The

The cattle were accordingly distrained, and were afterwards replevied. The 40*l.* 6*s.* 8*d.* appeared to be the aggregate of the assessments on the plaintiff under several rates, the originals of which were produced at the trial. The rates were regular in all respects, except that some of them appeared, by entries on the rates, to have been first published on *Sundays* which were not respectively the *Sundays* next after the allowances, contrary to the provisions of stat. 17 G. 2. c. 3. s. 1. The learned Judge directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendants.

1839.

SIBBALD
against
RODERICK.

Chilton now moved accordingly (a). The warrants were not wholly bad on account of their including some rates which had not been duly published. Stat. 17 G. 2. c. 3. s. 1. is directory only: in many cases it cannot be complied with, as where the church is under repair; but could such an omission make a warrant of distress absolutely null? It was not pretended that the notice had not reached the plaintiff. In *Hurrell v. Wink* (b) a distress was taken under a warrant for the aggregate of several rates, one of which had been quashed; and it was held that the party distrained upon might recover in replevin for the whole, because there had been no demand of the sum really due, but only a demand of the aggregate; the Court there distinguishing the case from that of a distress for rent. But here none of the rates has been quashed. In *Rex v. Newcomb* (c) it was said that the want of publication was a

(a) Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) 8 Taunt. 369.

(c) 4 T. R. 368. See *Regina v. Fordham*, post, pp. 81, 82, 83.

1839.

—
SIRBALD
against
RODERICK.

radical and incurable *defect* in the rate: but that was an application for a mandamus, and shews only that the Court will not compel justices to issue a warrant of distress where the “direction” of the statute has not been pursued. The plaintiff here should have appealed. “A defect in the rate (unappealed from) could not avoid the warrant; nor is the warrant void, so as to make it” (the distress) “a trespass *ab initio* ;” per Lord Mansfield C. J., in *Hutchins v. Chambers* (a). *Durrant v. Boys* (b) and *Marshall v. Pitman* (c) (which explains *Milward v. Caffin* (d)) are to the same effect.

Cur. adv. vult.

Lord DENMAN C. J., in this term (November 15th), delivered the judgment of the Court.

In this case it appeared, on the face of some of the rates, that they were not properly published. We therefore think that the warrant did not justify the distress.

Rule refused (e).

(a) 1 Bur. 587.

(b) 6 T. R. 580. See *Weaver v. Price*, 3 B. & Ad. 409.

(c) 9 Bing. 595.

(d) 2 W. Bl. 1330.

(e) See *Governors of Bristol Poor v. Wait*, 1 A. & E. 264.

Thursday,
November 7th.

TUCKER *against* NEWMAN.

Building a roof with eaves which discharge rain water by a spout into adjoining premises, is an injury for which the landlord of such premises may recover, as reversioner, while they are under demise, if the jury think there is a damage to the reversion.

CASE. The declaration stated that, before and at the time of the committing &c., a certain messuage and yard, with the appurtenances, situate in the county of *Hertford*, and adjoining to a certain house and land in the possession of defendant, was in the possession

and

and occupation of *William Cornwell*, as tenant thereof to plaintiff, the reversion thereof then and still belonging to plaintiff, and which said messuage and yard, with the appurtenances, before the commission of the grievances &c., had not been used, and still ought not, to be overflowed by the rain and moisture running off and from the said house and land in the possession of defendant, and being conducted therefrom into the said messuage and yard with the appurtenances whereof the reversion was so in plaintiff as aforesaid; yet defendant, well knowing &c., but contriving &c. to injure, prejudice, and aggrieve plaintiff in his reversionary estate and interest of and in the said messuage and yard with the appurtenances, whilst the same were so in the possession or occupation of the said *W. C.* as tenant thereof to plaintiff, and whilst plaintiff was so interested therein as aforesaid, and before the commencement of this suit, viz. on &c., and on divers other &c., wrongfully and unjustly, and without the leave or licence of, and against the will, of plaintiff, erected a certain building in and upon the said land in the possession of him, defendant, so close to the said yard whereof the reversion was so in plaintiff as aforesaid, and so constructed the said building, that the eaves thereof extended over the said yard, and conducted the rain and moisture off and from the said building into the said yard; and also afterwards, viz. on the days and times aforementioned, placed and fixed a certain trough or channel under and along the eaves of the said house so in the possession of defendant as aforesaid, and along and under the eaves of the said building, and by and through the said trough or channel conducted all the rain and moisture that flowed off and from

1839.

TUCKER
against
NEWMAN.

1839.

TUCKER
against
NEWMAN.

from the said house and building into a certain pipe there fixed and being, and through the said pipe into the said yard whereof the reversion was so in the plaintiff as aforesaid, and thereby inundated the same; and kept and continued &c. for and during a long time, viz. from thenceforth until and at the commencement of this suit; by means of which said several premises the rain has overflowed the said yard, and the same has at all times since the commission of the said grievances been rendered thereby so filthy, wet, and unwholesome that the said yard is become less fit and commodious for the purposes for which it had been theretofore used; and by reason thereof the said messuage and yard with the appurtenances are become much less fit for occupation, and are thereby much diminished in value, and the plaintiff hath been and is greatly injured &c. in his reversionary estate and interest of and in the said messuage &c., so in the occupation and possession of the said *W. C.* &c.

Pleas. — 1. Not guilty. 2. Denying that *Cornwell* occupied or was possessed of the messuage and yard, or either &c., as tenant to plaintiff, or that the reversion belonged to plaintiff at either of the times &c., in manner &c.: conclusion to the country. 3. Leave and licence: verification. Issues on the first and second pleas. To the third, replication, *de injuriâ*; and issue thereon.

On the trial before Lord *Denman* C. J. at the *Hertford* Summer assizes, 1839, it appeared that the defendant, in rebuilding his premises, adjoining those of the plaintiff, made a roof with eaves overhanging the yard in question, which belonged to the plaintiff but was in the occupation of a tenant; and that he placed under the
eaves

eaves a trough to catch the water which dripped from them, and convey it into a pipe, constructed by him at the same time, through which the water, as the plaintiff alleged, ran down upon his premises. The defendant's counsel objected that, on this case, no injury to the reversion appeared; for that an injury, to be so characterised, should be of a permanent nature; whereas, here, any damage that had been proved was, at the most, only disturbance of the possession. The Lord Chief Justice told the jury that it was for them to say whether the construction of the eaves was such as to cast the water on the plaintiff's premises; that there was, in his opinion, a fair case to shew that permanent injury was created; that the dripping might possibly be injurious to the reversion; and that it was for them to consider whether it was so or not. Verdict for the plaintiff.

1839.

TUCKER
against
NEWMAN.

Platt now moved for a new trial, on the ground of misdirection, and contended that, if the defendant was proved to have conducted the rain-water into the plaintiff's premises, that was not an injury for which the reversioner could sue. He cited *Baxter v. Taylor (a)*.

PATTESON J. The subject of complaint in that case was a single temporary act. Here the injury, when done, remained. In *Baxter v. Taylor (a)* the act was no injury in itself, but was complained of as done with intent to establish a right of way. In the present case, that which the defendant did was in itself something lasting. There is no ground for a rule.

(a) 4 B. & Ad. 72.

1839.

Lord DENMAN C. J., WILLIAMS and COLERIDGE Js.
concurring.

TUCKER
against
NEWMAN.

Rule refused (a).

(a) See *Jackson v. Peaked*, 1 M. & S. 234.; *Young v. Spencer*, 10 B. & C. 145.

Thursday,
November 7th.

HOLMES against NEWLANDS.

Trespass quare
clausum fregit.
Declaration,
August 1838,
laying tres-
passes on June
27th 1838.

Plea, that
W., being seised
in fee of the
close, before the
time when &c.,
to wit June
23d, 1791, de-
mised it to
J. H. for ninety
years, by virtue

of which demise J. H. afterwards, to wit on the same day, entered and was possessed: That after the demise, and during the term, J. H., being so possessed, to wit on November 21st 1812, made his will and thereby bequeathed the close to W. H. for all his, the testator's estate therein: That afterwards, to wit on January 17th, 1820, J. H. died so possessed of the said close for the remainder of the said term, after whose death, to wit on 21st February 1820, the executors assented to the bequest, whereby W. H. then became and was possessed for the remainder of the term: And, he being so possessed, plaintiff, under colour of a pretended demise to him for his life by W. before the demise by W. to J. H., entered, to wit on the day and year mentioned in the declaration, and was possessed: And thereupon defendant, at the time when &c., as the servant of W. H., entered upon plaintiff, &c.

Replication: That the trespasses were committed after 31st December 1833, mentioned in stat. 3 & 4 W. 4. c. 27. s. 2.: That the entry was for the purpose of recovering the said close: That the supposed right of entry did not first accrue within twenty years next before such entry, and that by reason thereof the said right had become extinguished at the time when &c.

Rejoinder: That no acknowledgment of title had been given, pursuant to stat. 3 & 4 W. 4. c. 27. ss. 14, 15., before the passing of the act: That W. H., at the time of the passing of the act, claimed to be and was entitled to the close as in the plea mentioned: That the close was not then possessed adversely to the right of W. H.: And that the entry was made, as in the plea mentioned, within five years next after the passing of the act.

Surrejoinder: That the close, at the time of the passing of the act, was possessed, to wit by one S., adversely to the alleged right of W. H. Issue thereon.

Held, that the replication did not admit a possession in J. H. or W. H. within twenty years, and therefore was not inconsistent with itself.

That, before the statute, the surrejoinder would have been bad, as admitting a demise to J. H., and shewing no subsequent title in plaintiff, nor any other matter in bar of J. H.'s title.

But that, since the statute, it being admitted by the rejoinder that W. H.'s right of entry did not accrue within twenty years, adverse possession by any person at the time of the act passing made W. H. a wrong-doer if he afterwards entered, and mere possession by plaintiff at the time of the trespass was sufficient ground for this action.

close

close in which &c., immediately expectant on the death of the said *Jane West*, and that, being so seised, afterwards and before the said time when &c., to wit on the day and year last aforesaid, by indenture then made between the said *Jane West* of the first part, the said *Temple West* of the second part, *Thomas Kendall* of the third part, and *James Hedger* and *Thomas Griffiths* of the fourth part (profert of the indenture dated as last aforesaid, and sealed with the seals of *Jane West* and *Temple West*), the said *Jane West* and *Temple West* did demise, lease, &c., to the said *James Hedger* and *T. Griffiths*, their executors, &c., the said close in which &c., habendum to *James Hedger* and *T. Griffiths*, their executors, administrators, and assigns, from the feast-day of the *Annunciation* then last past, for and during, and to the full end and term of, ninety years and a half from thence next ensuing. By virtue of which demise, *James Hedger* and *T. Griffiths* afterwards, to wit on the said 23d *June* 1791, entered &c., and became and were possessed &c. for the said term so to them thereof granted : That after the making of the indenture and during the term, *James Hedger* and *T. Griffiths* being so possessed &c., to wit on 12th *July* 1812, *T. Griffiths* died, and the said *James Hedger* survived him, whereupon and whereby *James Hedger* became solely possessed of the close in which, &c., for the remainder of the term then to come &c. : That *James Hedger*, being so possessed, afterwards, and during the term, to wit on *November* 21st, 1812, made and published his will, bearing date the day and year last aforesaid ; and thereby gave and bequeathed the close in which &c. to *William Hedger*, habendum to him, his executors, administrators, and assigns, for all *James Hedger's* said estate, term and interest therein : That afterwards,

1839.

 HOLMES
against
NEWLANDS.

to

1839.

HOLMES
against
NEWLANDS.

to wit on 17th *January* 1820, *James Hedger* died so possessed of the said close in which &c. for the remainder of the said term, after whose death, to wit on 21st *February* 1820, the executors appointed in the will proved the same, and took upon themselves execution, and assented to the said bequest; whereby *William Hedger* then became and was possessed for the remainder of the said term: And that, *William Hedger* being so possessed, the plaintiff, claiming title under colour of a charter of demise, pretended to be thereof made to him by the said *Jane West* and *Temple West* for plaintiff's natural life before the demise by them to *James Hedger* and *T. Griffiths*, whereas nothing of or in the said close in which &c. ever passed &c., afterwards and before the said time when &c., and during the continuance of the term granted to *James Hedger* and *T. Griffiths* as aforesaid, to wit on the day and year mentioned in the declaration, entered into and upon the said close in which &c., and was thereof possessed: And thereupon defendant, at the said time when &c., as the servant of *William Hedger* and by his command, entered into and upon the said close in which &c., and upon plaintiff's possession thereof, as being the close of the said *William Hedger*, and committed the trespasses &c. Verification.

Replication. That defendant entered &c., and committed the trespasses &c., as in the plea above acknowledged, after the passing of a certain act of parliament, &c. (stat. 3 & 4 *W. 4. c. 27.*), and also after the 31st *December* 1833, in the said act mentioned, to wit at the said time when &c. in the declaration mentioned: That such entry was so made in manner aforesaid for the purpose of recovering the said close in which &c.; and the said *William Hedger*, by the defendant his servant
in

in that behalf, by means of the premises in the said declaration mentioned, did then enter upon and obtain possession of the said close in which &c., as in the declaration also alleged, and as in the plea also mentioned: That the supposed right to make such entry as aforesaid did not first accrue to the said *William Hedger*, or to defendant as his servant, or to any person through whom the said *William Hedger* or defendant claims the estate and interest in the said close in which &c., within the true intent and meaning of the said act, at any time within twenty years next before the making of such entry as aforesaid; and that by reason thereof, and of the said period of twenty years next before the making of such entry having fully expired and determined before the making of the same without such right of entry having first accrued as aforesaid at any time during the said last mentioned period, the said supposed right of the said *William Hedger*, and of defendant as such servant as aforesaid, to make such entry, had been and was extinguished according to the force, form, and effect of the said act of parliament, and the true intent and meaning thereof, before and at the said time when &c. in the declaration mentioned. Verification.

Rejoinder. That no acknowledgment of the title of the person entitled to the said close in which &c., according to the said act of parliament, was given to the person entitled to the said close, or his agent, at any time before the passing of the said act; and that the said *William Hedger*, at the time of the passing of the said act, claimed to be and was entitled to the said close in which &c., as in the said plea mentioned; and that the possession of the said close in which &c. was not, at the time of the passing of the said act of parliament, ad-verse,

1839.

HOLMES
against
NEWLANDS.

1839.
 ———
 HOLMES
 against
 NEWLANDS.

verse, nor was the said close in which &c. then possessed by the plaintiff, or any other person, adversely, to the right or title of the said *William Hedger*, or any person through whom he claims; and that the said entry was made, and the said supposed trespasses committed, in manner and form as in the said plea is alleged, and for the reasons and causes therein mentioned, within five years next after the passing of the said act of parliament. Verification.

Surrejoinder. That the possession of the said close in which &c., at the time of the passing of the said act, was adverse, and the same was then possessed, to wit by one *William Shickle*, adversely, to the said alleged right and title of the said *William Hedger*. Conclusion to the country. Issue thereon.

On the trial before Lord *Denman* C. J., at the last summer assizes for *Surrey*, the case was left to the jury upon the question of adverse possession, and a verdict found for the plaintiff.

Channell now moved (a) for a rule to shew cause why a new trial should not be had, on the ground of misdirection in the leaving the above point to the jury; or why the judgment should not be arrested, on the ground that the plaintiff had admitted title in parties under whom the defendant claimed, and had alleged nothing to defeat that title but adverse possession in a stranger. He cited *Fenner v. Fisher* (b). (The grounds of motion are stated more fully in the judgment of the Court.)

Cur. adv. vult.

(a) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

(b) *Poph.* 1. *S. C. Cro. Eliz.* 288.

Lord DENMAN C. J. in this term (*November 21st*) delivered judgment as follows : —

1839.

HOLMES
against
NEWLANES.

By these pleadings the possession, at the time of the trespass, is admitted to have been in the plaintiff. The plea states a seisin of the *Wests*, and a demise by them to *James Hedger* and *Thomas Griffiths* on the 23d June 1791, and an entry by them; the death of *Griffiths*, the will and death of *James Hedger*, the survivor; bequest to *William Hedger*; proof of the will in 1820, and assent of the executors, whereby *William Hedger* became possessed; and, he being so possessed, plaintiff under colour entered.

The replication does not deny, and therefore admits, *William Hedger's* title, but asserts that his right of entry did not first accrue to *William Hedger*, or those under whom he claims, within twenty years of the entry, that is of the trespass complained of. The rejoinder admits this to be the case, but asserts that neither the plaintiff nor any one else was possessed *adversely* to *William Hedger* at the time of the passing of the late act, and that the entry by *William Hedger* was made within five years.

The surrejoinder asserts that the close was possessed adversely to *William Hedger*, to wit by one *William Shickle*.

Mr. *Channell* contends that the replication admits the actual possession of *James Hedger*, the survivor, at the time of his death in 1820, and shews that *William Hedger*, who claims under him, was dispossessed after 1820, of course that his right of entry first accrued when he was dispossessed, namely, within twenty years, therefore the replication is contradictory.

Now it may well be that *James Hedger* and *Thomas Griffiths*.

1839.

HOLMES
against
NEWLANDS.

Griffiths were actually possessed, and *James Hedger* may have died legally possessed of the term, but out of actual possession. The dates are under *videlicet*, and not in their nature material. The right of entry of *William Hedger*, or those under whom he claims, would first accrue when he or they were dispossessed, which, if the dates be immaterial, may have been more than twenty years before his entry, that is, the trespass complained of. The replication is not therefore contradictory; and, if the defendant meant to say that the right of entry first accrued within twenty years, he should have so rejoined by traversing the plaintiff's allegation. On the contrary, he has by his rejoinder admitted that *William Hedger's* right of entry did not first accrue within twenty years, and has put his case upon the question of adverse possession and the clause in the statute as to entry within five years, and asserts that the close was not possessed by plaintiff, or *any one else, adversely to William Hedger*.

If the surrejoinder had asserted that it was possessed by the plaintiff adversely, it would doubtless have been good; but it asserts that it was possessed, *to wit* by *William Shickle*; and this is contended to be bad in arrest of judgment. It is not inconsistent with the declaration, which alleges possession in the plaintiff, which possession the plea admits, because *William Shickle* may have been in possession at the passing of the late act, and yet the plaintiff may have been in possession at the time of the trespass.

But the case of *Fenner v. Fisher* (a) is relied on to shew that the plaintiff ought on these pleadings to

(a) *Popk. 1. S. C. Cro. Eliz. 288.*

have

have shewn specially title in himself; and that the judgment ought to be arrested, because he has not done so.

That case, as applied to the present record, shews that the plaintiff was at liberty to traverse the alleged lease from the *Wests* to *Hedger* and *Griffiths* without more, and that, if he had done so, and succeeded in that traverse, he would have been entitled to judgment by reason of the colour given him by the plea in bar, which shews the first possession to have been in him; but that, if he had admitted the lease to *Hedger* and *Griffiths*, and traversed any subsequent matter, say the will of *James Hedger*, then he must have shewn special title in himself, because, by admitting the lease to *Hedger* and *Griffiths*, which by the pleadings was subsequent in date to the title given by way of colour to the plaintiff by the plea in bar, he would have admitted that it was but colour, and that the first possession was, and the right still is, in another person, though not in the defendant. The case of *Fenner v. Fisher* (a) is therefore an authority for arresting the judgment here, unless the late statute (b) alters the state of things altogether.

Now, by the operation of that statute, the right of entry of the defendant is wholly taken away; for, by the pleadings, the entry appears not to have taken place within twenty years of the right first accruing, and the jury have found the possession adverse, so as to deprive him of the benefit of the fifteenth section. He has, therefore, lost his title, and is a mere wrongdoer, and in the same condition as if the plaintiff had traversed the lease from the *Wests* and obtained a verdict thereon. The case of *Fenner v. Fisher* (a) is, under the circum-

1839.

 HOLMES
 against
 NEWLANDS.
(a) *Popk.* 1. *S. C. Cro. Eliz.* 288.(b) 3 & 4 *W. 4. c.* 27.

1839.

HOLMES
against
NEWLANDS.

stances, in favour of the plaintiff. Moreover, as the defendant appears to be a wrongdoer, the simple possession of the plaintiff, stated in the declaration and confessed by the plea, is sufficient to entitle him to maintain trespass against the defendant.

For these reasons we are of opinion that the direction in the plaintiff's favour was right, and that the record is right; and, as the verdict of the jury is not impeached, no rule must be granted.

Rule refused.

Saturday,
November 9th.

The QUEEN against The Inhabitants of
BURSLEM.

The pauper, an illegitimate child, resided with his mother and a man whom she married, in parish B., and was maintained by them. While so resident he was apprenticed (by a charitable institution) to his mother's husband, for seven years, to learn the trade of a bricklayer. He resided with his mother and her husband as before, during the seven years.

During that time he never was taught nor served in the trade of a bricklayer, but worked at odd jobs about the house when he liked, and sometimes did work in the trade of a potter, under contracts of hiring entered into, by his master's consent, with various persons in B., paying his master a part of his wages for maintenance, and disposing of the rest as he chose:

Held, that the pauper gained a settlement by inhabitation in B. during the apprenticeship, under stat. 3 & 4 W. & M. c. 11. s. 8.

ON appeal against an order of justices, whereby *William Rogers* was removed from the parish of *Burslem*, in the county of *Stafford*, to the parish of *Newport* in the county of *Salop*, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper is the illegitimate son of *Susannah Rogers*, and was born in the parish of *Newport*, about 1826. Some years after, his mother married *Thomas Lainton*, a bricklayer, residing in the parish of *Burslem*.

By indenture, bearing date *September 13th*, 1830, between the pauper and his mother of the first part; *Lainton* of the second part; and the Rev. *William Sandford*, minister of *Newport*, *Thomas Blakemore* and *Thomas*

Collier,

Collier, churchwardens of *Newport*, of the third part : it was witnessed that the pauper, as well by the consent of his mother as of the minister, head schoolmaster, and churchwardens of *Newport*, and of five other persons of the town of *Newport*, elected for setting forth three poor boys apprentices with the charity money left for that purpose by *Mrs. Hannah Perks*, deceased, did bind himself apprentice to the said *Thomas Lainton* for the term of seven years ; and the said *T. L.*, in consideration of 6*l.* 12*s.* 8*d.* paid by the said *Sandford*, *Blakemore*, and *Collier*, did, amongst other things, covenant to teach, inform, and instruct, or cause to be taught, &c., the pauper, in the art, trade, or profession of a bricklayer, and during the whole time to provide and allow him meat, drink, washing, lodging, and apparel ; and to provide him with two suits of clothes at the end of the term. This indenture was duly executed.

From the time of pauper's mother's marriage to the date of the indenture, the pauper lived with and was maintained by her and her husband ; and, after the binding, and during the whole term of his apprenticeship, the pauper continued to live with them. Pauper never served *Lainton* for a single day during the apprenticeship at the trade of a bricklayer ; nor was he ever by any one instructed in, nor did he ever work at, such trade ; but, both before and after the binding, was in the habit of working at odd jobs about *Lainton's* house whenever he liked. During the period of apprenticeship, he worked under contracts of hiring entered into, with his master's consent, with various persons in *Burslem*, at the trade of a potter, paying *Lainton* a portion of his wages for maintenance, and disposing of the rest as he thought proper.

1839.

—
The QUEEN
against
The Inhabit-
ants of
BURSLEM.

1839.

The QUEEN
against
The Inhabit-
ants of
Burslem.

The question for the opinion of this Court was, whether the facts established an inhabitancy in *Burslem*, sufficient to confer a settlement in that parish?

Whateley and *Godson*, in support of the order of sessions. Under stat. 3 & 4 *W. & M. c. 11. s. 8.*, if any person “shall be bound an apprentice by indenture, and inhabit” in any parish, “such binding and inhabitation shall be adjudged a good settlement.” Instruction is one purpose of the apprenticeship, but maintenance and general superintendence are others; and it is “inhabitation” connected with apprenticeship that gains the settlement: service is not essential; *Rex v. Charles (a)*, *Rex v. Linkinhorne (b)*, *Rex v. Banbury (c)*. All that is said of working in the present case is superfluous. “Service is a criterion, but not the only one whereby to determine the character of the residence;” per *Patteson J.* in *Rex v. Linkinhorne (b)*. In *Rex v. Banbury (c)* the master and pauper had resided in different parishes; here the pauper resided with his master. It may be said that the boy lived with *Lainton* as his father in law; but *Lainton*’s house was the apprentice’s legal home, and his dwelling there must be referred to the apprenticeship. In *Rex v. Ilkeston (d)*, where the pauper was allowed to leave his master’s residence every *Saturday*, and stay at his father’s, in a different parish, till the *Monday*, the ground of decision against the settlement in that parish was, that the pauper’s inhabitation was not in furtherance of the purposes of his apprenticeship, but a mere indulgence.

(a) *Bur. S. C.* 706.(b) 3 *B. & Ad.* 413.(c) 3 *B. & Ad.* 706. See *Regina v. Somerby*, 9 *A. & E.* 310.(d) 4 *B. & C.* 64.

Where

Where a person bound by indenture has resided in a parish as apprentice, he is not to lose his settlement because the master would not teach him; nor will the Court inquire, after many years have elapsed, whether the master actually taught him or not.

1839.

—
The QUEEN
against
The Inhabit-
ants of
BURLING.

F. V. Lee and *E. Yardley*, contra. It is immaterial whether the apprentice resided in the master's parish or another, if the residence was in other respects such as the law requires. But here the apprentice was residing with *Lainton*, his mother's husband, before the execution of the indenture, as he continued to do afterwards. The facts of residence and maintenance, therefore, are not, in themselves, referable to the apprenticeship; and there is nothing else to shew that the relation of master and apprentice was adopted by the parties. Some act indicating such adoption should have been proved, to make a subsequent residence without actual service to the master an inhabitation under the apprenticeship. In every case where the Court has held that a residence under such circumstances conferred a settlement, that ground was first laid. It is not necessary to insist that the master must have taught: but something more is wanted than a mere residence subsequent to the binding and while the indentures are in force; *Rex v. Barmby-in-the-Marsh* (a), *Rex v. St. Mary Bredin* (b), *Rex v. Ilkeston* (c). In *Rex v. Linkinhorne* (d), where it was held that a settlement had been gained, the master was to pay for the maintenance of the pauper while residing at his mother's, and evidently continued to have controul over him there; the mother's house was merely

(a) 7 East, 381.

(b) 2 B. & Ald. 382.

(c) 4 B. & C. 64.

(d) 3 B. & Ald. 413.

1839.

The QUEEN
against
The Inhabit-
ants of
BURSLEM.

substituted for the master's; and there had previously been an actual service to the master. The same observations, as to the controul and previous service, apply to *Rex v. Banbury* (a). The fact that the pauper, in the present case, did service under contracts of hiring to other persons, with his master's consent, does not of itself decide any thing as to the settlement; the question is, whether such service was referable to the contract of apprenticeship or the contracts of hiring: if to the hiring, no settlement was gained: *Rex v. Whitchurch* (b), *Rex v. Shipton* (c). In *Rex v. Banbury* (*Banbury v. Witney*) (d), where the apprentice had, with the master's consent, worked for others, the work performed was in the master's own trade, and the Court considered that it was in fact done in furtherance of the object of the apprenticeship. *Rex v. Sandhurst* (e) was a similar case. Here no service was done which can be referred to the apprenticeship. And the case shews that the pauper in fact maintained himself.

LORD DENMAN C. J. I cannot distinguish this case from *Rex v. Linkinhorne* (g).

PATTESON J. I cannot see how there can be a doubt in any case where the pauper is bound apprentice and actually lives with the master.

WILLIAMS and COLERIDGE Js. concurred.

Order of sessions confirmed

(a) 3 B. & Ad. 706.

(b) 1 B. & C. 574.

(c) 8 B. & C. 88.

(d) 5 B. & Ad. 176. See *Rex v. Maidstone*, 5 A. & E. 326.

(e) 6 A. & E. 130.

(g) 3 B. & Ad. 413.

1839.

The QUEEN *against* The Justices of
WORCESTERSHIRE.

Saturday,
November 9th.

ON appeal against a poor rate for the parish of *Saint Nicholas* in *Worcestershire*, the sessions confirmed the rate, subject to the following case.

For many years prior to 1834, a large mansion-house, standing upon certain land in the parish of *Saint Nicholas*, within the city and borough of *Worcester*, had been always rated to the relief of the poor of the said parish of *Saint Nicholas*. The mansion-house and land were purchased in 1834 on behalf of the county of *Worcester*, for county purposes; the house was taken down under the powers of an act (1 & 2 *W.* 4. c. xlviii., local and personal, public (a)), some clauses of

Under a local act (1 & 2 *W.* 4. c. xlviii.) the justices of the peace of the county of *W.* (so described in the act) were authorised to purchase lands, &c., for the erection of a county hall, courts of justice, and lodgings for the Judges of assize for the county; and to erect the same: and they were to possess them for the purposes of the

act, and to pay for them out of the county rates; but the justices were not to be individually liable on any contracts. The materials, furniture, &c., were vested in them; and they were enabled to sue or prosecute in respect thereof in the name of the clerk of the peace, the property to be laid as the property of "the justices of the peace for the county of *W.*" The lands and buildings were vested in them on trust to suffer courts to be held, and other public county business to be transacted there. The buildings were to be insured, repaired, and furnished, at the expense of the county. The justices had power to let the Judges' lodgings, making reservation for the use of the judges and magistrates at proper times, and applying the rent to county purposes only. The justices were to be paid by the sheriff such sums as were allowed him by the exchequer for the accommodation of the Judges.

The buildings were erected and applied to the purposes of the act: but the house called the Judges' lodgings was not let. Wine was kept in the house, which was paid for by subscription by the magistrates, and drunk by them at their sessions' dinners; and some of the magistrates occupied bed-rooms there during their attendance at sessions, the rooms being appropriated to those who first bespoke them.

Held, that the justices of *W.*, as a body, were not liable to poor-rate, as occupiers of the Judges' lodgings.

(a) Stat. 1 & 2 *W.* 4. c. xlviii. (local and personal, public) is "For erecting a county hall and courts of justice, and also for providing accommodation for his Majesty's justices of assize, in and for the county of *Worcester*."

Sect. 1 empowers the justices of the peace for *Worcestershire*, in general

or

1839.

The QUEEN
against
The Justices of
WORCESTER-
SHIRE.

which were set out in the case; and a large pile of building, comprising a county hall, courts, and judges' lodgings, had been erected upon the land in 1837.

The

or quarter sessions assembled, "to make from time to time such order or orders for the purchasing in or near to the said city of *Worcester* a site or sites for the erection of a county hall and courts of justice, with suitable offices, and also lodgings for the accommodation of his Majesty's justices of assize for the said county, and for erecting and building the same respectively, or any of them, as to them the said justices of the peace so assembled, or the major part of them, shall appear expedient or necessary, and for paying, defraying, and discharging all the expenses, costs, and charges attending the purchasing and building the same." Sect. 2 gives the justices for the time being, so assembled, &c., power to contract for the purchase of houses, lands, &c., "for the uses and purposes of this act," and to pay for them out of the county rates; and, on payment, "the said justices of the peace, or any two or more of them respectively, their surveyors," &c., may enter and "take possession" of the houses, lands, &c., "for the purposes of this act." Sect. 10 authorizes the justices "to make, build, and erect, or cause to be made," &c., "on the ground, hereditaments, and premises so to be purchased or provided as aforesaid for the purposes of this act, a new county hall, courts of justice, offices, and lodgings for the accommodation of his Majesty's judges of assize for the said county, and all such other proper and necessary erections, buildings, and conveniences," &c. as the justices shall deem expedient, "and also to fit up and furnish, or cause to be fitted up and furnished, in a complete and effectual manner, with all proper and necessary furniture, articles, and things, the said new county hall, courts of justice, offices, and judges' lodgings, as they shall deem meet and expedient for the several purposes for which the said buildings shall be respectively designed, and for the doing whereof the said justices so assembled, or any two of them as aforesaid, or any person or persons by them appointed, are hereby authorised to make and enter into" contracts, &c. Sect. 11 enacts that the justices shall not be subject to any payment or personal liability by reason of their signing any grants, &c.; nor shall any contract, &c., conveyance, &c., made by the justices, "under or by virtue or in pursuance and execution of this act or any of the purposes thereof," bind or affect any of the justices in their private or individual capacities.

Sect. 13 enacts "that all timber, stone, brick, and other materials, furniture, articles, and things to be made use of, or to be bought, procured, or provided from time to time respectively, by the order of the said justices

The county hall and courts are under one roof. The courts are used, at the county assizes and sessions, for the trial of causes, prisoners, appeals, &c. There are also,

1839.

The QUEEN
against
The Justices of
WORCESTER-
SHIRE.

tices so assembled, or any two of them," "for the making, erecting, and building of the said new county hall," &c., "or any other buildings or work carrying on under this act, or for the fitting up and furnishing of the same, or otherwise for the purposes of this act, and which may not be the immediate property of their agents or contractors, shall from and after the passing of this act be vested in the justices of the peace for the said county, and they are hereby authorized and empowered" to bring actions, or prefer bills of indictment, against, or prosecute, "in the name of the clerk of the peace for the said county for the time being, any person or persons who shall steal, take away, injure, damage, or destroy any such timber," &c. ; "and any action so to be brought, and every indictment respectively, wherein any such timber," &c., "shall be laid to be the property of 'The justices of the peace for the county of Worcester,' without the insertion of the names of the said justices or any of them, shall be good and valid." Sect. 14 enacts that, upon payment of the purchase money, &c., and on the conveyance of the houses, &c., lands, &c. to the justices of the peace for the said county of Worcester, all the estate, right, &c., of the person or persons respectively to whom or for whose use the money shall be paid, in, to, or out of such houses, lands, &c., "shall vest in His Majesty's justices of the peace for the said county of Worcester for the time being for ever ; and the said new county hall," &c., "proposed to be erected on the site thereof, when built in pursuance of this act, with their respective appurtenances, and every or any future addition thereto, with every matter and thing appertaining to the same, shall in like manner be vested in the justices of the peace for the time being of the said county of Worcester, upon trust, peaceably, quietly, and freely to permit and suffer all the courts of the justices of assize, and nisi prius, oyer and terminer, and general gaol delivery, or special commissions for the said county of Worcester, and the general or quarter sessions of the peace for the said county of Worcester, and the county courts of the said county of Worcester, (whether for the purpose of elections to be held therein, or for ordinary judicial proceedings,) to be holden in the said courts of justice, or one of them, or in the said county hall, as the occasion may require, and also permit and suffer the said courts of justice," &c., "to be had, used, and enjoyed for the purposes for which the same may respectively be designed, and for such other public uses and purposes as the justices of the peace for the time being for the said county of Worcester, at the general or quarter sessions" &c., "or any two of them, shall from time to time direct or appoint."

Sect.

1839.

The QUEEN
against
The Justices of
Worcester-
shire.

also, within the same building, a grand jury-room, a room for the clerk of indictments, two rooms for holding the county records, and other rooms for the accommodation of the judges, magistrates, and counsel, at the assizes and quarter sessions. The hall is used for county meetings, and occasionally as a ball-room; and is at the command of the county for county meetings, either of business or pleasure, for which it

Sect. 16 enacts that the county hall, &c., shall be insured, kept in repair, and furnished, at the expence of the county, under the orders of the justices of peace of the county, in general or quarter sessions, or any two of them.

Sect. 19 enacts "that it shall be lawful for the said justices from time to time to let any house, premises, and furniture which may be erected, built, and provided under the authority of this act for the accommodation of His Majesty's justices of assize, to any person or persons from year to year, or for any shorter period than one year, for the best rent that can be obtained for the same, nevertheless reserving the premises for the use of His Majesty's Judges during the assizes, or for the holding of any special commission of oyer and terminer or gaol delivery, and also for the use of the magistrates assembled at quarter sessions; and the rent to be received or to arise by the letting of such house, premises, and furniture, or so much thereof as may be requisite, shall be expended and applied, by order of the said justices, in defraying any expences which may be incurred in cleaning, airing, or repairing the same; and any surplus which shall remain shall be paid to the treasurer of the said county for the time being, and shall be applied and disposed of in aid of any rate applicable to the use of the said county, and to or for no other use or purpose whatsoever."

Sect. 20 enacts "that it shall be lawful for the said justices, or for the treasurer of the said county for the time being, to take and receive from the high sheriff of the said county of Worcester for the time being, as a consideration for providing such lodgings and accommodation for His Majesty's Judges of assize, or for the holding of special commissions of oyer and terminer or gaol delivery as aforesaid, at each and every assize holden for the said county, such sum or sums of money as hath or have usually been or shall hereafter be allowed, paid, or issued by or out of His Majesty's Exchequer to the said sheriff for providing such lodgings and accommodation as aforesaid."

may

may be required; such as the nomination of knights of the shire, election of county coroners, and taking the poll at any election, &c. At the back of the courts, under a separate roof, but communicating with the courts by covered passages, is a house called the judges' lodgings, erected under the powers of the said act for the use of the judges and their suite during the assizes, and the magistrates during the sessions, and containing many sleeping and other apartments employed for the purposes aforesaid by the judges and magistrates.

The whole of the building and furniture have been paid for out of the county rates. A quantity of plate and wine (the former paid for by the county, the latter by subscription among the magistrates) is kept in this part of the building. The plate is used by the judges at the assizes, and by the magistrates at sessions. The wine is exclusively for the use of the magistrates at the sessions' dinners; they also supply themselves with their own provisions; but nothing is paid by them to the county for the use of the house and furniture. The judges' lodgings are at all times occupied by, and are under the care of, a man and his wife, who are called the hall-keeper and house-keeper, are paid a salary, and have the care of the whole building, both courts and lodgings. They have no child, and have no accommodation beyond what is necessary to enable them to discharge the duties of their station.

The house has not yet been let, nor is such letting contemplated; but, in pursuance of sect. 20, the county treasurer has received from the high sheriff 140*l.* for the use of the lodgings by the judges during the Lent and Summer assizes, 1838; and the same yearly sum, or
 whatever

1839.

The QUEEN
 against
 The Justices of
 WORCESTER-
 SHIRE.

1839.
 ———
 The Queen
 against
 The Justices of
 Worcester-
 shire.

whatever the sum may be, which is allowed the sheriff by the Court of Exchequer, will be demanded in future.

There are nine bed-rooms in the house, besides servants' apartments; and, at the quarter sessions, these nine bed-rooms are occupied by the magistrates; those having the preference who give previous notice to the hall-keeper. Before the house was built, the magistrates who attended the quarter sessions always slept at inns at their own expense.

The whole of the premises have been rated to the relief of the poor of the parish of *Saint Nicholas*, in the following manner:

"The justices of the peace for the county of *Worcester* for the time being:" for

"The judges' lodgings, situate in *Foregate Street* :

"Gross estimated rental, 140*l.*; rateable value, 119*l.*;

"Amount of rate, 2*l.* 9*s.* 7*d.*"

The local act was made part of the case.

Whateley and *Whitmore*, in support of the order of sessions. The justices have a beneficial ownership of the premises. They occupy them by keeping their wine there, by sleeping there, and by their servants living there. [*Coleridge J.* Who is to pay the rate? The justices are not a corporation. Suppose some of the justices never attend sessions.] The rate would, perhaps, ultimately come out of the county rate; but this is not a decisive test against the assessment. The justices are a quasi corporation, under the act; probably the rate might be enforced by distress. A similar question might have been put in *Regina v. Wallingford Union (a)*,

(a) 10 *A. & E.* 259.

where

where the guardians of an union were rated for a work-house built for the poor. [Lord *Denman* C. J. You must shew that the parties rated occupy beneficially.] That is shewn here: all the justices have the power of using the premises whenever they please. The case is within the principle of *Rex v. Green* (a) and *Rex v. Terrott* (b). In *Rex v. St. Giles, York* (c), it was decided that the absence of profit to the individual parties did not exempt from rate. In *Holford v. Copeland* (d) the masters in Chancery were held not to be rateable for their chambers; but, if they had occupied them for their own purposes, as if they had dined or slept there, they would have been rateable. No practical difficulty will arise here, any more than in the case of a club, where the secretary is generally rated, though there may be a thousand members. A firm might be rated, though some of the partners never, in fact, used the premises. The justices have power to let. [*Coleridge* J. They must apply the rent to public purposes.] The property cannot be vested in the justices for one purpose and not for another. The magistrates are all occupiers virtually: they must all subscribe for the wine. [Lord *Denman* C. J. You would put it as an acquiescence by the whole body in the occupation of certain members.] *Regina v. Wallingford Union* (e) is in point; and that case explains *Regina v. The Mayor &c. of Liverpool* (g). [*Coleridge* J. The property would be laid as that of the justices, in indictments, under sect. 13 of the local act.]

1839.

—
The QUEEN
against
The Justices of
WORCESTER-
SHIRE.

R. V. Richards and *W. J. Alexander*, contra. The purposes for which the justices, as a body, occupy the

(a) 9 B. & C. 203.

(b) 3 East, 506.

(c) 3 B. & Ad. 573.

(d) 3 B. & P. 129.

(e) 10 A. & E. 259.

(g) 9 A. & E. 435.

premises

1839.

—
The QUEEN
against
The Justices of
WORCESTER-
SHIRE.

premises (if at all) are public; and *Regina v. The Mayor &c. of Liverpool* (a) applies. Even those who attend the sessions do so in the discharge of a public duty; but, supposing those individuals to have a personally beneficial occupation, the rate on the whole body, as a kind of corporation, is bad. The whole body, indeed, have an ownership, as trustees; but the trusts are entirely for public purposes. The cases cited are inapplicable. In *Rex v. St. Giles, York* (b), a class of persons were admitted to the hospital from whom profit accrued to the parties rated. As to the occupation here by the servants, it does not appear who pays or employs them. The rating upon club houses takes effect by a tacit acquiescence, on the part of the members of the club, in the rating of the secretary. It is said that, in *Holford v. Copeland* (c), the Masters in Chancery would have been considered rateable if they had dined or slept at chambers; but, if so, the rate must have been on the individuals, not on all as a body. In *Regina v. Wallingford Union* (d) the guardians occupied in their corporate capacity, and received a benefit, as guardians, on behalf of the parishes which they superintended.

Lord DENMAN C. J. This rate is clearly wrong. It cannot be considered that the whole body of justices have, as such, a beneficial occupation. The benefit insisted upon in support of the rate is enjoyed by certain individuals who choose, at particular periods, to occupy the premises. The only profit which the whole body derive is applicable to a public purpose; and for such profit they are not rateable.

(a) 9 A. & E. 435.

(b) 3 B. & Ad. 573.

(c) 3 B. & P. 129.

(d) 10 A. & E. 259.

PATTESON J. The local act vests the property in the magistrates, who are to hold for public purposes. So far, therefore, as that goes, there is no beneficial occupation. If individual justices apply the premises to purposes not specified in the act, how is that an occupation by the body?

1839.

The QUEEN
against
The Justices of
WORCESTER-
SHIRE.

WILLIAMS J. The case has been well put by the counsel on each side. The premises are certainly applied to some purposes which are beyond the public purposes designated in the act; and no doubt, generally, a rate may be imposed in respect of property occupied for purposes *ultra* those which are public. But the answer to this is that, in the present case, the persons rated are not those who so occupy. The magistrates form a body, which is in the nature of a corporation, for public purposes only. Then, how can you make such a body rateable for an occupation which is shewn only from the personal benefit derived by certain individuals of the body?

COLERIDGE J. The act gives the body of the magistrates a legal estate for public purposes. In respect of that they cannot be rated. It is then argued that there is a beneficial occupation besides. But by whom? By individuals only, whom we cannot connect with the body at large.

Rate quashed.

1839.

Monday,
November 11th.

The QUEEN *against* The Mayor, Aldermen, and
Burgesses of SWANSEA.

Where a borough officer, dismissed under stat. 5 & 6 W. 4. c. 76., applied to the town council for compensation, and they did not within six calendar months determine on the claim, the Court made a rule absolute for a mandamus to them to execute a compensation bond; although they alleged, against the rule, that the statement of profits, delivered in by the applicant under sect. 66, did not shew the yearly amounts for five years next before the passing of the act, but only a yearly average down to the end of 1834: and that the applicant had had another person joined with him in the office, who, at time of the motion for a mandamus, had made no claim For

These objections, though they might have been an answer to the claim, did not render it a nullity; and the council, not having urged them within the six months, were concluded by the first proviso of sect. 66.

A RULE was obtained in *Michaelmas* term, 1838, calling upon the mayor, aldermen, and burgesses of *Swansea* to shew cause why a mandamus should not issue, commanding them to execute a bond for the payment of 973*l.* to *John Davies*, as compensation for the loss of his office of collector, treasurer, and common attorney to the corporation. An affidavit in support of the rule, made by *Davies*, stated that he was appointed to the office in *September* 1817, and removed, under stat. 5 & 6 W. 4. c. 76., on *April* 1st, 1836; and that on *December* 16th, 1836, he caused the following statement to be delivered to the town clerk.

“To the mayor,” &c. “I beg respectfully to state that I claim compensation for the loss of that office which I held under the late corporation of *Swansea*, for the period of eighteen years, as treasurer or common attorney. The salary derived by me from the appointment averaged, during the five years ending in 1834, 65*l.* 12*s.* per annum, the particulars of which are given on the other side (a). The above statement I declare is true to the best of my knowledge, information, and belief. I claim, therefore, the sum of 973*l.*, calculated according to government annuities. I am,” &c.

The council did not determine upon this claim within six calendar months after the statement was delivered. *Davies* thereupon requested the mayor, aldermen, and

(a) These were not stated in the affidavit.

councillors to execute a bond to him for 973*l*. No answer being given, he appealed to the Lords of the Treasury, who, after reading memorials from both parties, pronounced that they had no jurisdiction to entertain the appeal.

1839.

The QUEEN
against
The Mayor, &c.,
of SWANSEA.

The affidavit in opposition to the rule set forth, as one ground for refusing the compensation, that *Davies* held the office in question jointly with another person (likewise removed under the statute), who was, and claimed to be, entitled to a moiety of all emoluments accruing from it, but who had not, at the time of the motion on behalf of *Davies*, made any demand of compensation. *Davies*, in his affidavit before mentioned, admitted that another person was appointed together with himself, and that such double appointment was customary; but he represented that one person only was the acting common attorney, received the rents, and transacted the business, and that he himself had filled that station; that the second officer held little more than a nominal appointment; and that the office was never considered joint as to pecuniary interest.

It was further suggested by the affidavit in opposition to the rule that the common attorneys under the old corporation were appointed, not by the body corporate, but by the steward of the Duke of *Beaufort*, the lord of the borough.

Sir *J. Campbell*, Attorney General, and *J. Henderson*, now shewed cause. The prosecutor relies on that clause of stat. 5 & 6 *W. 4. c. 76. s. 66.* which enacts that, after a claimant for compensation shall have delivered in his statement as there directed, then, "if the council shall not determine on such claim within six calendar

1839.
 ———
 The QUEEN
 against
 The Mayor, &c.,
 of SWANSEA.

months after the aforesaid statement shall be delivered to the town clerk or treasurer, as the case shall be, such claim shall be considered as admitted." But here no "such claim" had been made, or "statement" delivered, as the act requires. First, the office was held by two joint officers, and one only made the demand. The corporation were not bound to take notice that one only did the business; they had a right to expect that *the officer* should make the claim. [*Coleridge J.* Do you say that there should have been a bond to them jointly?] At least there should have been a joint application. Secondly, *Davies's* statement did not, as sect. 66 requires, set forth "the amount received by him" "in every year during the period of five years next before the passing of this act on account of the salary, fees, emoluments," &c. The statement furnished only an average, and that ending with the year 1834, several months before the passing of the act. Further, it is at least a question, on these affidavits, whether *Davies* was an officer of the borough or not; and the case, so far, is like *Regina v. The Corporation of Poole (a)*, where, if the applicant had not been a borough officer, the Court would evidently have considered that circumstance a ground for discharging the rule.

Sir *W. W. Follett*, contra, was stopped by the Court.

Lord DENMAN C. J. It is impossible not to apply the proviso of stat. 5 & 6 *W. 4. c. 76. s. 66.*, relied upon by the prosecutor, to this case. No notice was taken of his claim by the council for six calendar months: *prima facie*, therefore, it was admitted. The grounds which have been alleged for taking this case out of the proviso

(a) 7 *A. & E.* 730.

might

might have been good grounds for opposing the claim. Had they been stated earlier, he might have shaped his claim better. But we cannot now enter into a nice examination of it, because of the words "such claim" and "the aforesaid statement." The joint officer, at the time when *Davies* applied to the town council, may not have thought himself entitled to compensation; or there may have been some arrangement between the two. At all events the plain words of the proviso must have their effect.

1839.

The QUEEN
against
The Mayor, &c.,
of SWANSEA.

PATTESON J. It is impossible to say that this claim was a nullity; and, that being so, the corporation, by taking no notice of it, have concluded themselves.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

The QUEEN *against* SARAH GAMBLE and JOHN BIRD.

Monday,
November 11th.

A RULE nisi was obtained, in *Michaelmas* term 1838, for a mandamus calling upon the above parties "forthwith to put into good, sound, and secure repair certain portions of the bank of the river *Ouse* and of the *Hundred Feet Bank*, which severally adjoin the farm and lands late of *John Gamble* deceased, and now belonging to the said *Sarah Gamble* and *John Bird* as his devisees, and in the said affidavits" (in support of the rule) "specified; and to make the same banks of sufficient

The Conservators of *Bedford Level* moved for a mandamus to land-owners to amend and heighten certain banks within the *Level*, which they were liable to repair *ratione tenuræ*, and which were alleged (but not admitted) to be in a dangerous state.

Writ refused, inasmuch as stat. 15 Car. 2. c. 17. s. 5. gave the conservators, within the *Level*, the authority of commissioners of sewers, and therefore they had a sufficient remedy in their own hands.

1839.

**The QUEEN
against
GAMBLE.**

height and strength for the protection of the lands in the fens or districts adjoining the said farm and lands.” The application was made by the governor, bailiffs, and commonalty of the company of Conservators of the great level of the fens, incorporated by stat. 15 *Car. 2. c. 17.*, “For settling the draining of the great level of the fens called *Bedford Level*,” sect. 2. The affidavits contained statements shewing that the banks in question were within the jurisdiction of the commissioners, and that *Gamble* and *Bird* were liable *ratione tenuræ* to repair them. There were contradictory affidavits, for and against the rule, as to the state of the banks, and the danger to be apprehended if they were not forthwith repaired. One of the affidavits in opposition to the rule referred to stat. 15 *Car. 2. c. 17. s. 5.*, which enacts that “the said governor, bailiffs, and conservators, or any five or more of them, whereof the said governor or bailiffs, and their successors, or any of them, to be two, are hereby enabled and impowered from henceforth to use and exercise the power and authority of commissioners of sewers within the said great level of the fens, and of the works made or to be made without the said great level for conveying the waters of the said great level by convenient out-falls to the sea, touching all matters and things whatsoever happening to be executed or done within the said great level, or the said works without the said great level, inquirable, punishable, or to be done, by commissioners of sewers, and therein to act and proceed by one or more juries of good and lawful men, inhabiting” &c.

Cresswell (with whom was *Byles*) now shewed cause (a). A preliminary objection to this rule is, that the prose-

(a) Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

cutors, who apply to the Court in the character of conservators of the great level, have remedies in their own hands for the default complained of, being invested with the authority of commissioners of sewers by stat. 15 Car. 2. c. 17. s. 5. That authority is recognised and continued by stat. 1 Vict. c. lxxxi. (local and personal, public) s. 91. On the principle, therefore, lately acted upon by this court in *Rex v. The Minister and Churchwardens of Stoke Damerel (a)*, a mandamus ought not to go. (He was then stopped by the Court.)

1839.

The QUEEN
against
GAMBLE.

Kelly, B. Andrews, and Wells, contra. The conservators have no power, as commissioners of sewers, to do the specific thing which this mandamus would require. The banks in question are not repairable by them as commissioners, but by individuals, *ratione tenuræ*. The conservators may amerce or indict, but cannot themselves heighten the banks and put them into repair. *Callis* says, in his "*Reading on the Statute of Sewers*," p. 183, that, "where one's land is charged by prescription and custom, there is no remedy to force and compel the tenant to do the repairs but by presentment, and upon a presentment, process may be awarded against him to distrain him to make the repairs." [*Williams J.* If a mandamus went, it would not produce an immediate repair]. The Court will not anticipate a false or dilatory return. There are many cases in which a mandamus is granted, where a thing necessary for the public safety is to be done under an act of parliament: *Rex v. The Ouze Bank Commissioners (b)* was a case of this kind. [Lord Denman C. J. The answer now made was not

(a) 5 A. & E. 584.

(b) 3 A. & E. 544.

1839.

The QUEEN
against
GAMBLE.

given there (a).] Assuming that there is a remedy by presentment, it is not so beneficial as that by mandamus, and therefore the writ ought to go: *Rex v. The Severn and Wye Railway Company* (b). [Lord Denman C. J.: I think the danger here would be better met by the other remedy than by mandamus. I believe it is generally thought that the decision in *Rex v. The Severn and Wye Railway Company* (b) went quite far enough.]

Cur. adv. vult.

Lord DENMAN C. J. on the following day (*November 12th*) said, In the case in which Mr. Kelly moved for a mandamus yesterday, we think we should not be justified in making the rule absolute. The parties have another remedy.

Rule discharged (c).

(a) Cause was shewn against the rule for the mandamus in *Trinity* term, 1834 (*June 7th*); but the objection urged as above was not taken.

(b) 2 B. & Ald. 646.

(c) In *Regina v. The Bristol Dock Company*, argued in this term, *November 23d*, the above decision was cited at the bar; and Lord Denman C. J. said, "We thought there that the parties applying for a mandamus might, as commissioners of sewers, or as conservators of the level, enforce the doing of the repairs, and, therefore, that they had the remedy in their own hands."

See *Rex v. Jeyes*, 3 A. & E. 416.; *Rex v. The Commissioners of the Thames and Isis Navigation*, 5 A. & E. 804., and p. 811. note (b); *Rex v. Payn*, 6 A. & E. 392; *Regina v. The Eastern Counties Railway Company*, 10 A. & E. 530.

1839.

The QUEEN *against* The Inhabitants of
FORDHAM.

Saturday,
November 9th,
and Wednesday,
November 13th.

ON appeal against two rates for the necessary relief of the poor of the parish of *Fordham*, in the county of *Cambridge*, the one made and allowed *July 3d*, 1838, the other, *August 21st*, 1838, the sessions, on preliminary objections, quashed both rates, subject to the opinion of this Court on the following case (a).

On *3d July*, 1838, the first-mentioned rate was made and allowed by the magistrates, duly published, and afterwards partially collected. In this rate the properties rated were not numbered according to the schedule annexed to the act 6 & 7 *W. 4. c. 96.*; but the numbers were for the most part wholly omitted, or else attached to the names of the occupiers instead of the properties. The columns intended for the number of votes were left entirely in blank. The names of many persons were inserted without any sums being carried out against them in the assessment. In many cases the column which should contain the name of the occupier was left entirely in blank, without even the word "ditto" under the name immediately preceding the blank; and the column which should contain the arrears due or ex-

The words of stat. 6 & 7 *W. 4. c. 96. s. 2.*, declaring that a rate "shall be of no force and validity," apply only where the declaration at the foot of the form is not signed by the parish officers; not where the particulars prescribed in the earlier part of the section are deviated from.

A rate is bad which is made for a period for which a rate has already been made and not quashed.

On motion to quash documents brought up by certiorari, the Court will not entertain the objection, that the documents appear by the return to have been mis-described in the writ.

(a) The introductory part of the case stated the proceeding at sessions as follows:—"The Court intimating to the appellant's counsel that it would be better to postpone the consideration of the fairness and equality of the rates till the preliminary objections had been disposed of, called on the respondents' counsel to answer those objections, and, after hearing him, quashed both the rates with costs, without examining the fairness or equality of the assessments, subject" &c. The notice of appeal, and the rates, were annexed to the case.

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1839.
 ———
 The QUEEN
 against
 The Inhabit-
 ants of
 FORDHAM.

cused was improperly left in blank. The appellants and others having refused to pay the sums for which they were therein rated, summonses were obtained against them, *August 7th*, 1838. The parties summoned appeared before the magistrates, *August 14th*, and three warrants of distress were granted, but not acted upon by the respondents, in consequence of their solicitor afterwards considering the rate bad and void.

The parish officers of *Fordham*, considering the rate of *July 3d* a nullity, on the 21st *August* ensuing made another rate. That rate had various defects on the face of it also. No entry was made under the head (a) of "Amount not recoverable, or legally excused." These objections on the face of the rate of *August 21st* were not stated in the notice of appeal against that rate, but were incidentally noticed by the Court; and no point was made by the respondents that the notice did not raise them. It appeared, likewise, that the rate of *August 21st* was for the same period as that of *July 3d*; the notice on the church door of the *August* rate stating it to be the first rate. The Court held that the rate of *July 3d* was informal, but that it could not be abandoned and treated as a nullity by the parish officers of *Fordham*, after the steps they had taken to enforce it, without an application to the sessions to quash it. With respect to the rate of 21st *August*, the Court held that, the rate of *July 3d* being in existence and uncollected, that of 21st *August* was a concurrent rate and illegal, besides which objection it was bad on the ground of informality.

If this Court should be of opinion that the court of quarter sessions were right in quashing both rates on the

(a) See pp. 76, 77, post.

facts above stated appearing, then the judgment of the sessions was to be confirmed. If this Court should be of opinion that the sessions were wrong, on the facts above stated, in quashing the rate of 3d *July*, but were right in quashing the rate of 21st *August*, then the order of sessions as to the rate of 3d *July* to be quashed, and, continuances being entered, if the Court should think the rate of 3d *July* a subsisting rate, the appeal as to that rate to be heard on the merits, and the rate of 21st *August* to be quashed with costs. If this Court should be of opinion that the sessions were wrong, on the facts above stated, in quashing the rate of 21st *August*, but were right in quashing the rate of 3d *July*, then the order of sessions as to the rate of 21st *August* to be quashed, continuances entered, and the appeal on that rate heard on the merits, and the rate of 3d *July* to be quashed with costs. If this Court should be of opinion that the sessions were wrong, on the facts above stated, in quashing either rate, then the order of sessions as to both rates to be quashed, continuances entered, and the appeal against both rates heard on the merits.

The rates and the notice of appeal were to form part of the case. And, after the argument in this Court had been begun, the following addition was made to the case by consent; the Court holding that the order of the Poor Law Commissioners could not be referred to unless set out.

“On 22d *June*, 1837, the Poor Law Commissioners for *England* and *Wales* issued an order under their seal of office (of which order a copy is annexed to and agreed to form part of this case), which order had been duly notified to the churchwardens and overseers of the poor

1839.

The QUEEN
against
The Inhabit-
ants of
FORDHAM.

1839.
 ———
 The QUEEN
 against
 The Inhabit-
 ants of
 FORDHAM.

poor of the said parish before the 29th *September* 1837." The annexed order, dated *June* 22d, 1837, began as follows.

"*Parochial Assessments.* Whereas, by an act" &c. : it then recited the enacting parts of stat. 6 & 7 *W.* 4. c. 96. ss. 1, 2. (*a*), and proceeded to direct that, from and after 29th *September* then next, no rate should be allowed by justices, nor should any rate allowed on or after that day be of any force, which should not be made according to the before-recited provisions of the act. And further, that every rate for the relief of the poor in *England* and *Wales*, made after the said 29th *September*, "shall be made in the form set forth in the schedule hereunder written, and shall contain an account of every particular set forth at the head of the respective columns therein, so far as the same can be ascertained, and the declaration given at the foot of the said form, being the same as is set forth in the schedule annexed to the said recited act as is thereby provided."

The heading and conclusion of the form of rate pursued the form given in the schedule to the act. The whole was as follows: —

(*a*) Stat. 6 & 7 *W.* 4. c. 96. (entitled "An Act to regulate Parochial Assessments") enacts, sect. 1, that, from and after &c., "no rate for the relief of the poor in *England* and *Wales* shall be allowed by any justices, or be of any force, which shall not be made upon an 'estimate' of net annual value, on the principle there stated. Sect. 2 enacts that every poor-rate made after the period prescribed by that act "shall, in addition to any other particular which the form of making out such rate shall require to be set forth, contain an account of every particular set forth at the head of the respective columns in the form given in the schedule to this act annexed, so far as the same can be ascertained; and the churchwardens and overseers, or other officers whose duty it may be to make and levy the said rate, or such a number of the said churchwardens and overseers or other officers as are competent to the making and levying of the same, shall, before the rate is allowed by the justices, sign the declaration given at the foot of the said form; and otherwise the said rate shall be of no force or validity."

AN assessment for the relief of the poor of the parish of —, and for other purposes chargeable thereon according to law, made this — day of —, in the year of our Lord one thousand eight hundred and —, after the rate of — in the pound.

[illegible]

1839.

**The QUEEN
against
The Inhabit-
ants of
FORDHAM.**

At the foot was a form of declaration by the parish officers as to the correctness of the particulars, as in the schedule to stat. 6 & 7 *W. 4. c. 96*.

Platt,

1839.
 ———
 The QUEEN
 against
 The Inhabit-
 ants of
 FORDHAM.

Platt, Gunning, and Byles, in support of the order of sessions. The first rate was bad, but not void, for all the informalities in it were amendable. The overseers, therefore, could not abandon it: *Rex v. The Justices of Cambridge (a)*; nor could they make another rate concurrent with it. The words in stat. 6 & 7 W. 4. c. 96. s. 2., “and *otherwise* the said rate shall be of no force or validity,” apply only to the enactment immediately preceding, that the parish officers shall sign the declaration annexed to the form, before the rate is allowed. The want of such signature would be an obvious defect; objections to the form might pass unnoticed till long after the rate had been put in force. At all events, informalities like those now pointed out can only make the rate voidable on appeal. Great hardship would arise if a variation, however slight, from the statute form, would entitle persons to treat the rate as a nullity, even after payments of it had been made and distress warrants issued to levy it. There is nothing to shew that such a rate as that of *July 3d*, if appealed against, might not lawfully have been confirmed by the sessions. Till quashed by them, it was a subsisting rate. If this were not so, magistrates or constables enforcing a rate would scarcely ever be safe from actions of trespass; and the right to be upon the burgess roll might be a subject of litigation long after the party had apparently possessed the franchise. The words “shall be of no force or validity” are merely equivalent to the corresponding ones in sect. 1, where it is enacted that no poor-rate “shall be allowed by any justices, or be of any force, which shall not be made upon an estimate” of net annual

(a) 2 A & E. 370.

value, as there pointed out. Can it be contended that, if a rate had been made on erroneous principles as to value, it might, at any future time, be treated as a nullity on that account? [Lord Denman C. J. Net value would be a point to be decided on appeal, and therefore exclusively for the sessions. Here the objections are said to be on the face of the rate.] The words of sect. 2 are, at any rate, not stronger than those of other enactments, in which "void" has received a qualified construction; as *Edwards v. Dick* (a), and the instances cited in *Winchcombe v. The Bishop of Winchester* (b). The rate of July 3d, therefore, was not void till it was brought before the sessions on the present appeal, and quashed: consequently the rate of August 21st, which was made for the same period, was a concurrent rate, and might well be quashed on that ground. The sessions decided that it was not a rate for the "necessary relief" of the poor, under stat. 43 *Eliz. c. 2. s. 1.*; and of that they were the proper judges. The informalities pointed out in the case were also proper grounds for quashing both rates.

But, further, the return to the certiorari bringing up the order of sessions is bad, inasmuch as it varies from the writ. The certiorari called upon the justices to return all orders made by them, between the appellants and respondents, touching a rate for the relief of the poor of *Fordham*. They return orders concerning two rates. [Coleridge J. Can you, appearing on behalf of the justices, say that what they have returned is improper?] That point may be taken in favour of the appellants. [Lord Denman C. J. Is the

1839.

The QUEEN
against
The Inhabit-
ants of
FORDHAM.

(a) 4 B. & Ald. 212.

(b) *Hob.* 165. 5th ed. See *Pearce v. Morrice*, 2 A. & E. 84.; *Re v. St. Gregory*, 2 A. & E. 99.

writ

1839.

—
The QUEEN
against
The Inhabit-
ants of
FORDHAM.

writ before us? What authority is there for taking such an objection in this stage of proceedings?] The writ is on the files of the Court. It is said, in 2 *Nol. P. L.* 591, 2, 4th ed., that proceedings not properly described in the certiorari need not be returned; and that, if the justices "do return records under it, the Court will give no judgment upon such as are improvidently removed, but will quash the certiorari;" and *Rex v. Hedingham Sible (a)* and *Regina v. Barking (b)* are cited. *Rex v. Newton (c)*, also cited there, shews that the objection may be taken at the present time. [Lord Denman C. J. There ought to be no doubt on this point. We think that, when a case from the sessions is being argued, it is too late to call upon this court to look at the certiorari. A motion might be made, at the proper time, to quash the return; but this course cannot be taken.]

B. Andrews and Tomlinson, contra.

It is contended, on the other side, that, inasmuch as the sessions had at least sufficient jurisdiction over the rate of *July* to enable them to quash or confirm it, the rate cannot be wholly void. The test whether a rate be void or only voidable is, whether or not it would be good if confirmed by the sessions; but here, even if the sessions had confirmed the rate, it would still be void, so as to make the party enforcing it liable in trespass or replevin. The cases on this subject are collected in *Governors of Bristol Poor v. Wait (d)*. [Lord Denman C. J. You need not argue this point.] On the act, the first question is, whether the final words of sect. 2, assuming

(a) *Burr. S. C.* 112.

(c) *Burr. S. C.* 157.

(b) 2 *Salk.* 452.

(d) 1 *A. & E.* 264.

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them to apply to all the provisions of that section, make the rate absolutely void. [*Williams J.* The words are as strong as those respecting publication, in stat. 17 G. 2. c. 3. s. 1.] They are so; and an omission to publish on the proper *Sunday* makes the rate wholly void; *Rex v. Newcomb (a)*. The words here are as strong as any that could be suggested; and they leave no discretion. The directions as to the form, in sect. 2, are peremptory; and their effect is distinguishable from that of the provisions in sect. 1, where the justices might hear evidence as to the value before allowing the rate. *Edwards v. Dick (b)* has been referred to; but that case rather makes against the argument on the other side: for, though the provisions of the statute (c) do not apply against an innocent party, in favour of a guilty one, yet, where they do apply, the instrument is utterly void. In *Rex v. Stoke Damerel (d)* the language of stat. 56 G. 3. c. 139. s. 11. was held to render an apprentice's indenture, contrary to the provisions of the act, absolutely void. Secondly, the words avoiding the rate apply to all the provisions: there is nothing to confine their effect: and, if they do not apply generally, the other provisions are not enforced by any enactment whatever. But, suppose the act to make the first rate voidable only, the sessions have avoided it; and that gives validity to the second rate. The order which quashes both rates is, at all events, bad: for, if the first be rightly quashed, the second is good, for the case then is as if the first had never been made. And, unless the avoidance clause has the effect of avoiding the rate for the informality, the

1839.

The QUEEN
against
The Inhabit-
ants of
FORDHAM.

(a) 4 T. R. 368. And see *Sibbald v. Roderick*, ante, p. 38.

(b) 4 B. & Ald. 212. (c) 9 Ann. c. 14. s. 1. (d) 7 B. & C. 563.

1839.

—
The QUEEN
against
The Inhabit-
ants of
FORDHAM.

whole ground of the jurisdiction of the sessions fails. Again, if the first rate be not void, the justices should have heard on the merits. Further, it does not follow that, even if the first rate be good till quashed, the second rate is bad as a concurrent rate; for the officers, if they saw a defect which must ultimately prove fatal, were justified in at once imposing a good rate. They were bound to provide for the sustenance of the poor. The policy of the law (especially as shewn by stat. 2 & 3 *Vict. c. 84.*, which contains very stringent provisions for compelling the collection of poor-rates) is to enforce raising the funds necessary for relief as speedily as possible. The schedule to 6 & 7 *W. 4. c. 96.* requires that the form of rate shall specify the "arrears due;" that shews that the previous rate is considered to be still in force when the new one is made. [Lord *Denman* C. J. The collector would levy these as he went round; but that would not make the rate a new rate for the same period. *Coleridge* J. The collection would be under the old rate.] (The counsel opposing the order of sessions then argued on the alleged informalities in the second rate: but the judgment of the Court renders it unnecessary to report this part of the argument.) The *August* rate could not be quashed without notice of appeal stating the defects, under stat. (U. K.) 41 G. 3. *c. 23. s. 4.*, or consent, in default of such notice, under sect. 5, even if the defects appeared on the face of the rate; *Rex v. Bromyard* (a).

Lord DENMAN C. J. Perhaps this discussion, and others on similar phrases, may induce the legislature to

(a) 8 B. & C. 240.

say, on future occasions, in what respects they mean any particular proceeding to be void, which they declare to be so in general terms; and what consequences they intend should result from the invalidity. In the absence of this, we have great difficulty in all such cases. It is here argued that the first rate is void by noncompliance with the form prescribed by sect. 2, which, after giving directions for the form of making the rate, and for the signature of the declaration by the parish officers, adds, "and otherwise the said rate shall be of no force or validity." I think these words apply only to the signing of the declaration. But I am led to this conclusion, in some degree, by considering the enormous consequences which will follow from holding the rate to be invalidated by a failure in any of the minute details prescribed by the act. On such a construction, if a jury, in an action of trespass, thought the net rateable value was not properly taken in any one instance, the whole proceeding must be held illegal, and the defendants would be liable. This surely cannot have been intended. We shall do no violence to the language of the act by confining the application of the clause in question to the case of non-signature of the declaration; and no bad consequence will follow: though, whether it was worth while to attach so much importance to this ceremony, it is not for me to say. *Rex v. Newcomb* (a) is distinguishable. That was an application for a mandamus to aid the collection; and the act declares that, in default of publication, no rate "shall be esteemed or reputed valid and sufficient so as to collect and raise the same." The sessions, therefore, were wrong in

1839.

The QUEEN
against
The Inhabit-
ants of
FORDHAM.

(a) 4 T. R. 368.

1839.

**The QUEEN
against
The Inhabit-
ants of
FORDHAM.**

quashing the rate of the 3d of *July*; for, though the act requires the other particular provisions to be complied with, the nullity of the rate must attach only to the provision which comes last. The first rate, therefore, was in existence when the second rate was made for the same period. It was argued, though not very confidently, that there may be two rates for the same period. I think that cannot be: if a rate already exist, no one should be called on to pay a second. The second rate, therefore, is not good; and the result is that the sessions were wrong in quashing the first rate, but right in quashing the second. Then it seems that they did not take into consideration other objections to the first rate, raised on the notice of appeal under stat. (U. K.) 41 G. 3. c. 23. The order, therefore, for quashing the first rate must be set aside, and the objections to it on the merits must be heard: and the order quashing the second rate must be affirmed.

PATTESON J. The statute 6 & 7 W. 4. c. 96. s. 2. does indeed provide that the rate shall contain certain particulars; but it does not lay down what is to be the consequence of omitting such particulars. We cannot say that the words "otherwise the said rate shall be of no force or validity" apply to the whole: they must be taken to apply only to the case of a declaration not being signed. Then, as the act gives no appeal to the sessions, and prescribes no mode of correcting the inaccuracies to which those words do not extend, the sessions could not take on themselves to quash the first rate. What the proper course is — whether or not the overseers were indictable — I cannot say; and, for the present purpose, this is immaterial. The quashing of the

the first rate was therefore wrong; and the case must go back to sessions. But the second order was rightly quashed, as the first was not void.

1839.

—
The QUEEN
against
The Inhabit-
ants of
FORDHAM.

WILLIAMS J. I would not add any remark, but that this is the first occasion on which the clause in question has been discussed. I think there is no ground for considering this rate a nullity: that consequence arises, I think, only on the omission to sign the declaration. Suppose ten thousand persons are included in the rate, and there is an omission of one particular in a single instance: is the party who levies the rate to be a trespasser? Yet such is the length to which the principle insisted on must be carried. The sessions, therefore, were wrong in quashing the first rate without hearing the merits. I agree, also, that a concurrent rate (that is, a rate for the same period as that of 3d July,) is not sustainable. Mr. *Andrews* alluded to the case of outstanding arrears; and it is true that a new rate is not void merely because there are unsatisfied arrears of the old; but that has no bearing on the case of concurrent rates for the same period.

COLERIDGE J. I think the sessions were right in quashing the second rate, as being concurrent with the first, assuming the first not to be a nullity. Then, as to the first, I decline putting any interpretation on the words "of no force or validity." Words as stringent as these have been modified in many of the old cases; but I should be sorry to extend that mode of interpretation. But, where the effect may be grammatically confined to the clause immediately preceding, and there is as good reason, so far as the language is con-

1839.

—
The QUEEN
against
The Inhabit-
ants of
FORDHAM.

cerned, for one interpretation as for the other, one may fairly look at the consequences of each interpretation, in order to determine the choice. Now in sect. 2 we find two distinct periods; at the end of the latter comes the clause in question: it may, therefore, grammatically, be applied to the latter alone as well as to both. Then, being at liberty to look at the consequences, we see that the doctrine contended for in support of the order quashing the first rate would lead to results most fatal to a large parish. Numerous requisites are prescribed; and we see how unimportant some of them are: and it is said that the whole rate is null and void, if the form fail to satisfy any one of them. But, if you confine the clause to the last requisite, the enactment becomes so reasonable and easy in practice that one is glad to find the construction admissible. Then, if the first rate be not void, reason shews that there cannot be another rate. Stat. 43 *Eliz. c. 2. s. 1.* prescribes that the stock for the poor shall be raised "weekly or otherwise." Can two stocks be raised for the same week, or other period? The sessions, therefore, were, in my opinion, right as to the second rate, and wrong as to the first. I do not say that the first rate was correct; for it does not follow the provisions of the act. But, as the power of the sessions to quash rates arises only from acts of parliament, and stat. 6 & 7 *W. 4. c. 96:* gives them no power to quash for informality on their own suggestion, it is safe to say that the sessions have here done wrong in quashing this rate. It may, however, turn out that the party is entitled to relief by his right of appeal under former statutes; and therefore the rate must go back to the sessions.

B. Andrews

B. Andrews then contended that, as only one of the rates had been rightly quashed, the respondents were entitled to costs.

1839.

—
The QUEEN
against
The Inhabit-
ants of
FORDHAM.

Lord DENMAN C. J. The question of costs should be reserved to the sessions.

Ordered, that so much of the order of sessions as quashes the rate of 3d *July* 1838, with costs, be quashed, and that the sessions do enter continuances and rehear the appeal against the said rate, on the merits, and that the costs be in their discretion. And that so much of the order of sessions as quashes the rate of 21st *August* 1838 be affirmed.

The QUEEN *against* The Inhabitants of
ARLECDON.

Wednesday,
November 13th.

ON appeal against an order of two justices, whereby *Mary Host* and her two bastard children (each under three years of age) were removed from the parish of *Arlecdon* to the parish of *Cleator*, both in *Cumberland*, the sessions quashed the order, subject to the opinion of this Court on a case.

It appeared from the case that the officers of *Cleator* gave notice of appeal for the *Michaelmas* sessions 1838, stating, as the only ground of objection, matter impugning the settlement of the paupers in the appellant parish.

On appeal against an order of removal, the appellants (under stat. 4 & 5 W. 4. c. 76. s. 81.) served a statement of objection, which only impugned the alleged settlement. On the hearing of the appeal, the bench, being equally divided, adjourned the case to the next sessions. Before the next sessions, the appellants served another statement, containing an objection to the notice of chargeability under sect. 79.

The sessions having quashed the order of removal, on the objection last mentioned: Held, that the objection ought not to have been entertained, since it was not mentioned in the original statement of grounds of appeal; and the Court sent the case back to sessions to be heard on the merits.

1839.
 ———
 The QUEEN
 against
 The Inhabit-
 ants of
 ARLECDON.

The appeal was heard at the *Michaelmas* sessions, when the magistrates, being equally divided, adjourned the appeal to the *Epiphany* sessions following. Before the *Epiphany* sessions, the appellant parish served a fresh notice of trial of the appeal, dated 15th *December*, 1838, and specified additional grounds of objection, and, among others, the objection "that a notice in writing was not, within a reasonable time after the said order of removal was made, sent by the overseers or guardians of your said parish of *Arlecdon*, or by three or more of such guardians, to the overseers of the parish of *Cleator*." On the hearing at the *Epiphany* sessions, the appellants insisted upon this last-mentioned ground; but the respondents contended that no ground of objection could be relied upon, notice of which was not served before the first hearing. The sessions, however, entertained the objection, and, considering it fatal, quashed the order.

If the Court of Queen's Bench should be of opinion that the court of quarter sessions came to a right conclusion on the case, then the order of removal was to be quashed and the order of sessions confirmed: if the contrary, then the order of sessions to be quashed, and the original order of removal and case to be dealt with as the Court of Queen's Bench might think right.

Cresswell and *Wightman*, in support of the order of sessions. The appellants were entitled, at any time before the final hearing, to vary their grounds of objection. It is like an amendment allowed by a Court after a second argument has been directed, and before it has taken place; or after a case has been made a remanet. [Lord *Denman* C. J. Can a party amend his

his pleadings after a demurrer has been argued, and the Court has taken time to consider?] This case came before the bench, at the *Epiphany* sessions, as a case unheard. A case sent back from this Court to be restated must be reheard as altogether new (*a*). [*Cole-ridge J.* Perhaps there would have been no adjournment, if all the objections had been brought forward at the first sessions.] The respondents suffer no injustice: they are furnished with notice to meet all the objections against which they have to contend on each occasion. Where an appeal has been entered and adjourned, a fresh statement of grounds of appeal, varying from those formerly stated, may be given; *Regina v. The Justices of Derbyshire* (*b*). (The argument as to the objection itself is omitted.)

1839.

The QUEEN
against
The Inhabit-
ants of
ARLECDON.

Ramshay, contra. In *Regina v. The Justices of Derbyshire* (*b*) the case had not been heard at all; it was respited merely because there was not time to hear it. The statement of the grounds of appeal had not been before the sessions. Here the case is as if the argument had been heard on two successive days of the same sessions, and an attempt had been made to introduce new objections in the interval. (He was then stopped by the Court.)

LORD DENMAN C. J. I think you take the correct view. *Regina v. The Justices of Derbyshire* (*b*) is not like this case. There no trial had taken place. Where an appeal has been simply entered and respited, the

(*a*) See *Rex v. Bramley*, 6 T. R. 330; *Rex v. The Earl of Effingham*, note (*a*) to *Rex v. The Justices of Pembrokeshire*, 2 B. & Ad. 393.; *Rex v. Bloxam*, 1 A. & E. 386.

(*b*) Note (*b*) to *Rex v. Kimbolton*, 6 A. & E. 612.

sessions

1839. sessions may proceed on a fresh statement; but that is not so here.

The QUEEN
against
The Inhabit-
ants of
ARLECDON.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Ramshay then contended that the order of sessions should be quashed, the appellants having relied upon a formal objection, and therefore being, presumably, without merits; 2 *Nol. P. L.* 618 (4th ed.); *Rex v. Honiton*, there cited (a).

Lord DENMAN C. J. The case must go back to be heard on the merits.

Order accordingly.

(a) *Bur. S. C.* 680.

Wednesday,
November 13th.

The QUEEN against The Inhabitants of WHITLEY UPPER.

Stat. 56 G. 3.
c. 139. ss. 1, 2.
provides several
requisites to
the due binding
of parish ap-
prentices;
among others,
that the binding
be ordered, and
indenture
allowed and

ON appeal against an order of two justices, whereby *William Child* was removed from the township of *Flockton* to the township or place of *Whitley Upper*, both in the West Riding of *Yorkshire*, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

An appellant parish stated (under sect. 81 of stat. 4 & 5 W. 4. c. 76.) as the ground of appeal against a removal founded on a settlement by parish apprenticeship, "that the requisites of stat. 56 G. 3. c. 139., and more particularly sect. 5, were not complied with."

Held, that the appellant parish could not, under this statement, dispute the settlement at sessions, on the ground that their overseers had no notice, and were not present at the binding.

The

The grounds of removal, as set forth in the examination of the pauper, a copy of which was sent to the appellants with the order for his removal, pursuant to stat. 4 & 5 W. 4. c. 76. s. 79., were that he was illegitimate, and born in the township of *Flockton*; and that, when seventeen years of age, he was bound apprentice by the overseers of *Flockton* to *George Walker*, of *Whitley Upper*, until he should attain the age of twenty-one years; and that he duly served his apprenticeship at *Whitley Upper*. The notice of appeal stated the grounds thereof as follows. "That the said *William Child* was born in your said township of *Flockton*, and has never done any act whereby to gain a legal settlement in the said township of *Whitley Upper*, inasmuch as the requisites of a certain act of parliament," 56 G. 3. c. 139., "and more particularly the fifth section of that act, were not complied with when the said *William Child* was put and bound apprentice by the churchwardens and overseers of the poor of your said township of *Flockton* to " &c. It appeared, on the hearing of the appeal, that the pauper was, previously to and at the time of the binding hereinafter mentioned, in the service of the said *George Walker*, his father in law, who was present with him before the justices; and, after they had signed their allowance of the indenture, the pauper was there bound by the overseers of the respondent township as a parish apprentice to *George Walker*, in pursuance of an order of the said justices, previously made in that behalf, and referred to in the indenture. After the respondents had closed their case, the appellants proposed to prove that the overseers of the appellant township were not present at the binding, and that no notice was given to them previously to or at the binding

1839.

—
The QUEEN
against
The Inhabit-
ants of
WHITLEY
UPPER.

1839.

—
The QUEEN
against
The Inhabit-
ants of
WHITLEY
UPPER.

ing of the pauper, pursuant to stat. 56 G. 3. c. 139. (a). The respondents objected to the reception of this evidence, as shewing a ground of appeal not set forth in the statement of grounds of appeal. The Court, after argument, refused to receive the evidence, and therefore confirmed the order.

The question for the opinion of this Court was, whether, under the preceding notice of appeal and statement of grounds, the proposed evidence ought not to have been received: if the Court should be of that opinion, then the order of sessions was to be quashed, or the case sent back to be reheard, as the Court should determine.

Dundas (with whom was *J. T. Ingham*) in support of the order of sessions. Sect. 5 of stat. 56 G. 3. c. 139., to which the notice of objection refers, contains no provision for notice to overseers, except through the reference implied by the words "as hereinbefore directed." If the statement of the grounds of objection

(a) Sects. 1 & 2 provide, among other requisites to the binding of parish apprentices, that the binding be ordered, and the indenture signed and allowed, by particular justices: and, by sect. 2, where the party to whom the apprentice is bound resides in a different county or jurisdiction of the peace from that in which the binding parish is situate, &c., the indenture shall be allowed by two justices of each county, &c.: and that "notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be shall allow such indenture; and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice." Sect. 5 enacts "that no settlement shall be gained by any child who shall be bound by the officers of any parish, township or place, by reason of such apprenticeship, unless such order shall be made, and such allowances of such indenture of apprenticeship shall be signed, as hereinbefore directed."

applies

applies to this, it applies to all the numerous particulars prescribed by sects. 1 and 2: the officers are therefore left to conjecture upon which of them the intended objection arises, and to put a legal construction upon every part of sects. 1, 2, and 5. Even if the objection arose upon matter appearing directly in sect. 5, the statement would be too general: it ought to contain the facts upon which the objection arises. *Rex v. Kelvedon (a)* may be cited on the other side. There, in the examination, the pauper stated that his father resided in the respondent parish, but belonged to the appellant parish, and continued to belong there until his death, as the pauper had heard and believed; and that the pauper had heard his father say that he was a certificated man from the appellant parish: and it was held that the respondents might prove a settlement of the father by apprenticeship in the appellant parish. But the statement of grounds of objection ought to be more precise than the examination, which is given in the pauper's words, whereas the statement of the grounds of objection is made in the words of the appellants themselves. The distinction between sects. 79 and 81 of stat. 4 & 5 W. 4. c. 76. is pointed out by Coleridge J. in the case cited. Under stat. 49 G. 3. c. 68. s. 5. it was necessary to set out the cause and matter of the appeal so that the respondents might know precisely what objections they had to meet; *Rex v. The Justices of Oxfordshire (b)*. In *Rex v. The Justices of Derbyshire (c)* it was held that a statement of grounds was insufficient, which alleged a subsequent settlement in a third parish by hiring and service, and again a subsequent settlement in the respondent parish by hiring

1839.

The QUEEN
against
The Inhabit-
ants of
WHITLEY
UPPER.

(a) 5 A. & E. 687.

(b) 1 B. & C. 279.

) 6 A. & E. 885.

and

1839.

—
The QUEEN
against
The Inhabit-
ants of
WINTLEY
UPPER.

and service, both without dates and names of parties. If this statement let in the objection relied upon, a general objection to a settlement by occupying a tenement would raise every particular objection which the law on that class of settlements can comprehend. (He was then stopped by the Court.)

Wortley and *Carrow*, contra. The objection was a good one, if the statement entitled the appellants to rely upon it; *Rex v. Newark-upon-Trent* (a), *Rex v. Threlkeld* (b), confirmed, as to this, by *Rex v. Whiston* (c). Then it is clear that the appellants were entitled to specify any number of objections in their statement, subject only to the discretion of the sessions in awarding costs, should any turn out to be frivolous, under sect. 83. Here the statement, by referring to sect. 5, which, in effect, embodies all the provisions of the earlier sections, announces an objection as to each particular prescribed by the statute; it could not be necessary to set out the words of sects. 5, 1, and 2: the reference to the statute, in fact, gives more information than such a detail would give. [*Coleridge* J. Must you not state facts? Would it be enough to say, "you have violated all the provisions of the act?" Are the overseers to be put to rely on their own interpretation of the clauses, or to ask for an opinion?] They must interpret the statutory language, however the objection is stated. Where an examination sets out all the particulars requisite to a settlement, it is sufficient for the statement of grounds of objection to deny that settlement generally. [*Cole-*

(a) 3 B. & C. 59.

(b) 4 B. & Ad. 229.

(c) 4 A. & E. 607.

ridge J. The examination is confined to facts.] The denial of the settlement is a sort of general issue on all those facts. Here, all the facts necessary to a parish apprenticeship are denied; and the respondents are put upon the proof of all except the notice, as to which the burden of proof lies on the appellants, who are to shew the want of notice; *Rex v. Whiston* (a). The appellants, then, know precisely what they are to prove, and what is to be proved against them. There is no pretence of a variance which could mislead, as in *Ex parte Broseley* (b) and *Rex v. Holbeach* (c). *Rex v. Kelvedon* (d), perhaps, is distinguishable, as there the question arose, not on the statement of grounds of objection, but upon the examination. But *Rex v. The Justices of Cornwall* (e) goes farther than is necessary for the appellants here. In *Rex v. The Justices of Derbyshire* (g) the Court prescribes the degree of particularity required. "The clauses in this act respecting the grounds of removal and appeal are intended to compel such a disclosure, by both parties, as will enable them to go to the sessions fully aware of the questions which are to be discussed: and we think that we best effectuate such intention by holding that the statements must not be in general terms, but must condescend to particulars, not to the extent of setting out the evidence by which facts are to be proved, but so as to give the opposite party reasonable means of enquiry." Here those requisites are, in effect, satisfied. And a stricter rule will tend to defeat justice, which the Court will not

1839.

The QUEEN
against
The Inhabit-
ants of
WHITLEY
UPPER.

(a) 4 A. & E. 607. And see *Rex v. Witney*, 5 A. & E. 191.

(b) 7 A. & E. 423.

(c) 5 A. & E. 685.

(d) 5 A. & E. 687.

(e) 5 A. & E. 134.

(g) 6 A. & E. 885. See p. 893.

do,

1839.

The QUEEN
against
The Inhabit-
ants of
WHITLEY
UPPER.

do, except where, as in *Rex v. Holbeach (a)*, the case leaves no power of applying a liberal interpretation. The effect of such a rule here will be to increase expense, as parish officers will be driven to have all their statements drawn by counsel.

Lord DENMAN C. J. I think it is the duty of parish officers to procure legal advice: the consequence of their doing so will be the diminution, not the increase, of expense and litigation. I do not agree that justice was defeated by the decision in *Rex v. Holbeach (a)*. I think it extremely probable that the decision frustrated an attempt to take advantage of a point not suggested in the statement of objections. I cannot see that a loose construction of the statute is free from danger, and that the only danger to be apprehended is from a strict interpretation. I am not at present prepared to say, with my brother *Coleridge*, that it might not be enough to state, as the objection, that none of the provisions of the act have been complied with: it struck me as possible that that might be enough. But, at all events, it is much better that the statement should specify facts. And here, at any rate, the statement clearly does not point to the objection relied upon.

PATTESON J. If I thought this decision likely to produce voluminous statements, I should regret coming to it. But of that, I think, there is no danger. The statement, here, not only leaves the respondents in ignorance of the intended objection, but tends positively to mislead. Sect. 5 of stat. 56 G. 3. c. 139. says only

(a) 5 A. & E. 685.

“ unless

“unless such order shall be made, and such allowances of such indenture of apprenticeship shall be signed, as hereinbefore directed.” The allowance was made, and the indenture signed. It is said that the last words incorporate the provisions of sect. 2, which invalidates the indenture where notice has not been given to the overseers. But, if that was what the statement of objection had in view, the appellants have, whether intentionally or not, misled the respondents.

1839.

—
The QUEEN
against
The Inhabit-
ants of
WHITLEY
UPPER.

WILLIAMS J. The object of the provision in sect. 81 was, that the intended ground of objection should be made clear to the respondents. I cannot see the difficulty which strikes Mr. *Wortley*; nor can I understand how our decision can make it necessary to call in the aid of counsel or attorney. All that was necessary for the appellants to do here was to say simply that no notice of the binding was given to the overseers of the appellant township, and that none of them attended the justices or admitted the notice.

COLERIDGE J. The remark which I made during the argument, and to which my lord has adverted, was directed only to the act of 56 G. 3. c. 139. I think it would not be sufficient notice of the objection now before us, to say that none of the requisites of that statute had been complied with. What the effect of those requisites is we know by having discussed them; opinions respecting them have differed, till a decision has been given on the disputed question by the judges: in one case, indeed, the Court was not unanimous (*a*). It seems to me a little

(a) *Rez v. Newark-upon-Trent*, 3 B. & C. 59.

1839.

The QUEEN
against
The Inhabit-
ants of
WHITLEY
UPPER.

too strong for the overseers to say, "the Poor Law Amendment Act requiring a statement of the objections, our objection is that you have not complied with stat. 56 G. 3. c. 139., about the effect of which nobody has any doubt." This is to refer the officers of the respondent parish, not to facts, but to an act of parliament. I do not mean that it would in no case be sufficient to refer to a statute: still I say that in all cases it is much safer to confine the statement to facts which it is intended to prove or dispute at the sessions.

Order of sessions confirmed.

Friday,
November 15th.

HOUNSFIELD *against* DRURY and COPELAND
Gent., One &c.

In an action for maliciously and without reasonable cause refusing to accept a tender of debt and costs, for which plaintiff was in execution at defendant's suit, the defendant may give evidence of probable cause under the plea of Not Guilty.

An order of the Insolvent Debtors' Court under 1 & 2 Vict. c. 110. ss. 36, 37., vesting the estate of an insolvent in the provisional assignee, is sufficiently proved by a copy on paper, sealed with the seal of the Court, and certified by the provisional assignee. It is not necessary to shew more particularly that such assignee is the officer in whose custody the order is; or to prove the creditor's petition on which it was granted.

CASE for maliciously and without reasonable cause refusing to accept a tender of debt and costs for which the now plaintiff was detained in execution at the defendant's suit. Pleas. 1. Not Guilty. 2. Denying the tender. Issues thereon. On the trial, before *Coltman J.*, at the last *Yorkshire* Summer assizes, it appeared that, in *November* 1838, the now plaintiff was detained in execution at the suit of *Drury* for a debt and costs. *Copeland* was *Drury's* attorney in the action. The amount of debt and costs was tendered to *Drury* by agents of the now plaintiff. *Drury* declined accepting it without *Copeland's* consent; the parties went to *Copeland*, and he said, "*Hounsfeld*" (the now plaintiff) "is insolvent: a vesting order has been obtained; and I cannot take the money." It was accordingly refused.

The

The defendants' counsel, at the trial, put in a copy of an order obtained under stat. 1 & 2 *Vict. c. 110. ss. 36, 37.*, vesting the estate of the plaintiff in the provisional assignee. The copy was on paper, sealed with the seal of the Insolvent Debtors' Court, and certified by the provisional assignee; and, for the admissibility of such a copy in evidence, they referred to stat. 1 & 2 *Vict. c. 110. s. 105.* It was objected, for the plaintiff, that the provisional assignee was not shewn to be the "officer, in whose custody" the original was: and that, assuming this objection to be unfounded, the evidence was incomplete without proof of the petition, filed by *Drury*, the detaining creditor, upon which the order issued. The learned Judge admitted the evidence. It was also contended, for the plaintiff, that the evidence, if tending to shew reasonable and probable cause, was irrelevant, because that fact was not put in issue by the plea of Not Guilty. The learned Judge overruled this objection; and a verdict was found for the defendants on the first issue, and for the plaintiff on the second; leave being reserved to move to enter a verdict for the plaintiff on the first issue.

1839.

HOUNSFIELD
against
DURY.

Dundas moved, in this term (a), for a rule to shew cause why the verdict should not be so entered, or why there should not be a new trial on account of the improper reception of evidence. As to the relevancy: in an action on the case for malicious prosecution, the maliciously prosecuting, and the want of probable cause, make up the injury complained of; and the plea of Not Guilty throws it upon the plaintiff to prove both: *Cotton*

(a) November 7th. Before Lord Denman C. J., *Patteson, Williams and Coleridge* Js.

1839.
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 HOUNSFIELD
 against
 DEBURY.

v. Browne (a). But detaining a party in custody after tender of the debt and costs is an act in itself wrongful, and from which, according to the judgment of *Abbott* C. J. in *Crozer v. Pilling (b)*, malice must be inferred. [Lord *Denman* C. J. He says the act "must be presumed to have been malicious, in the absence of any circumstance to rebut the presumption of malice."] If there are such circumstances, they must be pleaded. The plea of Not Guilty puts in issue merely the doing of an act which the law holds to be malicious in itself unless the contrary be alleged and proved. As to the reception of a copy: even the original order would not have been sufficient without proof of a regular petition. And it appears by stat. 1 & 2 *Vict. c. 110. s. 46.* that the copy should be on parchment.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court. The questions in this case were, whether sufficient evidence was given of the vesting order, and whether there was a necessary inference of malice from the refusal of a tender, which could not be rebutted under the plea of Not Guilty. We were of opinion, at the time of the motion, that the order had been well proved; and we think that it afforded satisfactory evidence of bona fides in the defendants, and properly answered the *prima facie* proof of malice appearing on the plaintiff's case. There will therefore be no rule.

Rule refused (*c*).

(a) 3 *A. & E.* 312.

(b) 4 *B. & C.* 26.

(c) See the next case.

1840.

The following Case may conveniently be added here.

DRURY against HOUNSFIELD.

A RULE was obtained in *Michaelmas* term, 1840, calling upon the plaintiff to shew cause why the defendant should not be forthwith discharged out of the custody of the sheriff of *Yorkshire* as to this action, and why the plaintiff should not pay the costs of the application. The parties were the same as those in *Hounsfeld v. Drury*, page 98, *antè*. The following facts appeared on affidavit for and against the rule.

The defendant *Hounsfeld*, being in the custody of the sheriff of *York* on mesne process at the plaintiff's suit, a detainer in execution for 140*l.* debt and costs was lodged against him, *September* 18th, 1838, in the same action. On *October* 1st, in that year, stat. 1 & 2 *Vict.* c. 110., for abolishing arrest on mesne process, came into operation. The plaintiff, in the same month (his debt and damages remaining unpaid), petitioned for and obtained from the Insolvent Debtors' Court, pursuant to sect. 36 of the act, an order vesting the defendant's estate and effects in the provisional assignee. In *November* 1838, the clerk of an attorney employed by the defendant, with the defendant's wife, went to the plaintiff and tendered the debt and costs under the circumstances stated in the preceding case; but the plaintiff ultimately declined receiving them, on the ground that the money tendered was vested in the provisional assignee. Immediately after the *York* Summer assizes, 1839, the defendant moved, before *Parke* B., at

Where a creditor, on his petition to the Insolvent Debtors' Court under stat. 1 & 2 *Vict.* c. 110. s. 36., has obtained an order (s. 37.), vesting the estate of his insolvent debtor in the provisional assignee, such creditor is not bound, on the debtor afterwards tendering the amount of debt and costs, to assent to his discharge from custody; nor will this Court order such discharge as to the creditor's action, on affidavit of tender and refusal.

1840.

DRURY
against
HOUNSFIELD.

chambers, that he might be discharged out of custody on payment of the debt and costs; but the learned Judge, after taking time for consideration, refused to make such order. At the time when the present motion was discussed, the defendant was indebted to other persons than the plaintiff, and, though served with the vesting order, had not filed his schedule under sect. 69 of the act. The affidavits in support of this motion contained statements tending to shew that the money offered to the plaintiff was not part of the defendant's estate; but this point requires no further notice than will be found in the judgment of the Court. The order was not set forth on the affidavits. In *Michaelmas* term, 1840 (a),

Cresswell and *Martin* shewed cause. The tender was rightly rejected; and the defendant cannot claim his discharge. This is the case of a vesting order obtained by a creditor. It was the defendant's duty, on being served with such order, to file his schedule: and he cannot avoid that duty by tendering to the creditor money which, by the act of the Insolvent Debtors' Court, is vested in the assignee. The creditor could not receive the money as his; or, if he had done so, it might have been recovered from him again. Nothing that has passed can affect the vesting order. Sect. 37 makes a distinction between such an order when granted on the insolvent's own petition and when obtained by a creditor. In the former case, the order becomes null and void if the petition be dismissed by the Insolvent Debtors' Court; in the latter, it is only declared "that it shall

(a) November 25th. Before Lord Denman C. J., Littledale, Williams, and Coleridge Js.

be lawful for the said Court, if it shall seem just and right, but not without proof made to the satisfaction of the said court of the consent of the petitioning creditor, to make order declaring such vesting order to be null and void, and the same shall thereupon be null and void to all intents and purposes ;" the property, therefore, remains in the assignee till divested by a formal act of the court. The effect of stat. 1 & 2 *Vict. c. 110. s. 37.* was much considered in *Woodland v. Fuller (a)* : and the view there taken of it by the Court is consistent with that now relied upon by the plaintiff. *Crozer v. Pilling (b)* may be cited for the defendant ; but there no question was raised as to the debtor's right to the money which he tendered. The grounds to be alleged for the present motion would have entitled the plaintiff in *Hounsfield v. Drury (c)* to a new trial.

1840.

DRURY
against
HOUNSFIELD.

Sir *W. W. Follett* and *Newton*, *contra*. *Hounsfield v. Drury (c)* was decided on points independent of that now taken. In *Crozer v. Pilling (b)*, where it was held that the creditor was bound to accept the debt and costs, the objection now raised to such acceptance would have applied quite as strongly as in the present case ; but no one suggested it. The question here is, whether the vesting order prevents the prisoner from being discharged out of custody. That an adjudication of the Insolvent Debtors' Court is not always necessary for that purpose, appears from sect. 37, which contemplates a discharge without, as well as under, such adjudication ; and from the restriction imposed, in particular

(a) Argued and decided in B. R. in *Easter* term (*May 5th.*) 1840.

(b) 4 *B. & C.* 26.

(c) *Antè*, page 98.

1840.
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 DRURY
 against
 HOUNSFIELD.

cases, by sect. 41. And the discharge without adjudication could be in no other mode than by payment or tender. As the law stood before this statute a prisoner might, by payment, obtain his discharge without an act of the Insolvent Debtors' Court; and the statute was passed in favour of liberty, not to keep parties in custody who would not have been detained before. It would be hard to give this particular effect to a vesting order, made, not on the prisoner's petition, but in invitum as to him, at the instance of a creditor. The argument on the other side is, in substance, that the creditor is not bound to take the money tendered, because it is not the debtor's money. The answer is, that the creditor, even if he paid over the sum received to the assignees, would be in no worse situation than before. But it appears from sect. 37 that, in this case, the plaintiff, as petitioning creditor, might have had the vesting order vacated: no other creditor is contemplated in that clause as interested in the order. Sect. 69. enacts that, when a vesting order has been made, the prisoner shall deliver a schedule to the Court; but it neither gives any process of detainer, nor authorises any other mode of proceeding to keep the party in custody for that purpose under the present circumstances. [*Lit- tledale J.* Supposing that the plaintiff, on being paid, had abandoned all further proceedings, could another creditor have availed himself nevertheless of the vesting order?] Although the order remained in force for this purpose, the defendant would equally be entitled to his liberty. The order attaches to the estate, not the person. Further, the order, if relied upon by the plaintiff, should have been exhibited by him to this Court.

The

The Court said that the case required consideration, and, this being the last day of term (a), that judgment should be given at chambers in ten days.

1840.

DRURY
against
HOUNSFIELD.

Cur. adv. vult.

The reporters have been favoured with a copy of the judgment, which was delivered at chambers, on *Saturday, 5th December*, by

COLERIDGE J. This was a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody, he being detained under a *ca. sa.* for debt and costs. The ground for claiming his discharge was the tender of these to the plaintiff, which had been refused under the following circumstances; and whether these justified the refusal was the question. The plaintiff, under the thirty-sixth section of the 1 & 2 *Vict. c. 110.*, had petitioned the Insolvent Debtors' Court and procured a vesting order; the tender was made after this by the defendant's wife, and before the defendant had filed any schedule as required by that Court. The reason assigned by the plaintiff for refusing to accept the money was, that it formed part of the defendant's estate, and was, therefore, vested by the order in the provisional assignee; that he should therefore not be safe in accepting it, but should be obliged to refund it to the assignee; that it was, therefore, no satisfaction of the debt and costs, and consequently cast upon him no obligation to give the defendant his discharge. This reason, having been assigned at the time the refusal was given, drew the attention of the defendant to the ques-

(a) The Court, in this case, waived the usual objection to be points of law discussed on the last day of term.

1840.

DRURY
against
HOUNSFIELD.

tion whose money it was that was tendered to the plaintiff; and the manner in which it is now sworn, in the affidavits for the rule, that the money was obtained, shews also that the attention of the defendant and his friends was at the very time alive to the importance of this fact. Bearing this in mind, we observe that neither the defendant, nor any one on his part, distinctly denies the money to have been the proceeds of his personal estate; and we feel satisfied, as well from this as from what is stated in the affidavits, that the money must be taken to have been furnished from the defendant's estate.

But, assuming this to be so, two points were made for the defendant. First, the case of *Crozer v. Pilling* (a) was relied on as being exactly in point, because, under the circumstances there stated, the money tendered by the plaintiff, if it had formed part of his estate, would, by the Insolvent Act then in force, equally have passed to the assignee, and the defendant, therefore, would have had as good cause for refusing to discharge the plaintiff as the present plaintiff has for his refusal to discharge the present defendant. We cannot, however, attach much weight to this. That was an application for a new trial, refused on the hearing, and the point now raised was not mentioned either at the bar or by the Court; besides which, the defendant there had refused the discharge on another and totally untenable ground, insisting, namely, that beyond the debt and costs in the action, he would be paid some costs incurred in opposing the plaintiff in the Insolvent Debtors' Court.

(a) 4 B. & C. 26.

Secondly,

Secondly, it was said that the plaintiff could not be prejudiced, even if the money were recovered back from him, because, upon his own shewing, he was now only entitled to come in *pari passu* with the other creditors, and therefore it would be but just that the sum so tendered should find its way into the hands of the provisional assignee.

And this is true: but it does not touch the question, which is, whether the plaintiff was *bound* to sign the discharge, and, if not, whether the Court should now direct it. The plaintiff was not bound to discharge the defendant, because the exigency of the writ was not complied with by the tender. If the money tendered was clearly money which the plaintiff could not retain, the receipt of it was no satisfaction of the debt and costs; and it is satisfaction only, actual or legal, that entitles the defendant to a discharge. Nor ought the Court to order a discharge; because we cannot but see that that would assist the defendant in evading the order of the Insolvent Debtors' Court to file a schedule and so put his estate in a course of distribution among his creditors.

This rule, therefore, must be discharged; and, as it was moved with costs, discharged with costs.

Rule discharged.

1840.

DRURY
against
HOUSFIELD.

1839.

Friday,
November 15th.

BRYAN *against* Sir GEORGE ARTHUR.

Under stat.
9 G. 4. c. 83.
s. 9., the go-
vernors of *New*
South Wales
and *Van Di-*
emen's Land
have power to
revoke assign-
ments of con-
victs, without
any remission
of their sen-
tences.

TRESPASS. The first count charged that the defendant heretofore, towit 2d *December* 1833, in parts beyond the seas, towit in the colony of *Van Diemen's Land*, that is to say at *London*, with force and arms assaulted *William Willington*, and twenty eight other persons named, then severally being the servants of the plaintiff, assigned to the plaintiff as such servants by the governor of the colony of *Van Diemen's Land*, by virtue of an act &c. (stat. 5 G. 4. c. 84.), for divers terms of service then and still unexpired, and then forcibly took away and removed the said persons respectively, so being such servants as aforesaid, from the house and premises of the plaintiff, and forcibly kept them so removed for a long space of time, towit from thence hitherto, whereby the plaintiff, during all the time aforesaid, was deprived of the services of the said several persons respectively, and was, by reason thereof, greatly injured and damnified in his estate and property for want of the labour and services of the said persons respectively, and was compelled to pay and expend, and did pay and expend, large sums of money, amounting to a large sum, towit 1000*l.*, as well for the hiring of other servants and labourers, as for the non-performance of certain contracts which he was unable to perform for want of the services of the said persons; and lost and was deprived of divers great gains &c.

Plea to first count. That, before and at the time &c., the defendant was the governor of the colony of *Van Diemen's Land*; and that the said several persons in
the

the first count mentioned, so being such servants of plaintiff, were offenders assigned to plaintiff in pursuance of the said act of parliament therein also mentioned, and were no otherwise his servants than under and by virtue of such assignment: that, it seeming meet to defendant, as such governor, to revoke the said assignment of the said persons, and to cause them to cease to be the servants of plaintiff, defendant, just before the said time when &c., towit on 1st *December* 1833, did revoke (a) the said assignment of the said offenders so made in pursuance of the said act of parliament in the said first count mentioned. Wherefore defendant, after the said revocation of the said assignment, and in order to put an end to the service of the said persons with plaintiff, and to take them away from him, towit on the day and year aforesaid, assaulted the said persons, then being such servants of plaintiff as aforesaid, and then took away and removed them from the house and premises of plaintiff, and kept them so removed, as it was lawful &c. Verification.

General demurrer and joinder.

(There were also issues of fact.)

Sir *W. W. Follett* for the plaintiff. The plea appears to turn on stat. 9 *G. 4. c. 83. s. 9.*, which (after referring to the provision in stat. 5 *G. 4. c. 84. s. 8. (b)*, vesting in the governor of the colony to which offenders are transported, or in other consignees there designated, the property in the service of such offenders), enacts "that any offender who hath heretofore been or shall hereafter be assigned to any person or per-

1839.

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BRYAN
against
ARTHUR.

(a) Under stat. 9 *G. 4. c. 83. s. 9.* See the argument.

(b) See post, p. 112.

1839.

 BRYAN
 against
 ARTHUR.

sons within the said colonies" (of *New South Wales* and *Van Diemen's Land*) "respectively, under and in pursuance of the said act, shall not, by any such assignee or assignees, be assigned over to any other person or persons, except with the written consent and license of the governors of such colonies respectively; and that it shall and may be lawful for the governors of the said colonies respectively from time to time, as to them shall seem meet, to revoke any such assignments of offenders as may have been or as shall hereafter be made in pursuance of the said act, and to grant to any offender or offenders transported to the said colonies such temporary or partial remissions of their sentences as to such governors may seem best adapted for the reformation of such offenders, and such temporary or partial remissions from time to time to revoke and renew, as occasion may require; any thing in the said act, or in any other act of parliament, to the contrary in any wise notwithstanding." The defendant contends that this section gives absolute power to the governor to revoke any assignment of a convict: the plaintiff contends that the power is not absolute, but can be exercised only upon remitting the sentence.

The original statute of transportation, 4 G. 1. c. 11. (a), provided, by sect. 1, that certain offenders should be sent to the colonies and plantations in *America* for seven years; and that the "court before whom they were convicted, or any subsequent court held at the same place, with like authority as the former, shall have power to convey, transfer and make over such offenders,

(a) See the enumeration of the statutes in *Rex v. Baker*, 7 A. & E. 502. Also 6 *Evans's Statutes*, 287 a (3d ed.), where stats. 39 *Elizabeth*. c. 4. and 22 *Car.* 2. c. 5. are referred to. And see stat. 31 *Car.* 2. c. 2. s. 14.

by

by order of court, to the use of any person or persons who shall contract for the performance of such transportation, to him or them, and his and their assigns, for such term of seven years ;” and an analogous provision is made for other offenders to be transported for fourteen years, &c. ; “ and such person or persons so contracting, as aforesaid, his or their assigns, by virtue of such order of transfer as aforesaid, shall have a property and interest in the service of such offenders for such terms of years.” Sect. 2 provided that the Crown might pardon and dispense with the transportation, and allow the return of the offenders, “ they paying their owner or proprietor ” “ such sum of money as shall be adjudged reasonable by any two justices of the peace residing within the province.” Subsequent statutes, as 6 G. 1. c. 23., 20 G. 2. c. 46., 8 G. 3. c. 15., 19 G. 3. c. 74. (which made the law of transportation applicable to any place of transportation to be fixed on by the Court), 24 G. 3. c. 56. (which passed after the independence of the United States, and by which the Crown had power to appoint the place of transportation), 27 G. 3. c. 2. (establishing a criminal judicature for *New South Wales*), 28 G. 3. c. 24. s. 5., left the offender the property of the contractor. Then stat. 30 G. 3. c. 47. s. 1. enabled governors of the places to which offenders were transported to remit the punishment wholly or partially, absolutely or conditionally. No provision was made, as formerly in the case of remission by the Crown, for compensation to the contractors. Still, as the pardon was not likely to be granted without reason, there was no risk of caprice or injustice towards the owner of the convict. Stat. 55 G. 3. c. 156. s. 2. enacts that “ such person or persons so contracting as aforesaid, his or
their

1839.

 BRYAN
against
ARTHUR.

1839.

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 BRYAN
 against
 ARTHUR.

their assigns, by virtue of such order of transfer" as therein mentioned, "shall have a property in the service of such offender or offenders for such term of life or years for which such offender or offenders shall have been ordered to be transported." Then stat. 5 G. 4. c. 84. s. 8. enacts "that so soon as any such offender shall be delivered to the governor of the colony, or other person or persons to whom the contractor, or such nominee or nominees as aforesaid" (parties nominated, under sect. 7, by the secretary of state, to have custody of the offender during the voyage) "shall be so directed to deliver him or her, the property in the service of such offender shall be vested in the governor of the colony for the time being, or in such other person or persons; and it shall be lawful for the governor for the time being, and for such other person or persons, whenever he or they shall think fit, to assign any such offender to any other person for the then residue of his or her term of transportation, and for such assignee to assign over such offender, and so as often as may be thought fit; and the property in the service of such offender shall continue in the governor for the time being, or in such other person or persons as aforesaid, or his or their assigns, during the whole remaining term of life or years for which such offender was sentenced or ordered to be transported." Here there appears to be (by mistake) no power of remission in the governor. Sect. 9 provides that the act shall not affect the royal prerogative of mercy. The governor may assign; but it seems that his consent is not necessary for any subsequent assignment. Then stat. 9 G. 4. c. 83. s. 9. makes the consent of the governor of *New South Wales* or *Van Diemen's Land* requisite to the assignment of
 convicts

convicts there, enables the governors to revoke such assignments, and adds further enactments to secure the prerogative of mercy, which appears to be all that is intended by the power of revocation. The revocation, therefore, can be made only as incidental to the remission. If the governor had an absolute power of revocation, his consent to the assignment need not have been required; but it was required, because the legislature contemplated the continuance of the property so long as any part of the sentence remained unsatisfied and not remitted. The object seems to have been to cure the mistake in the preceding act; which appears the more probable from the provision referring to assignments which have already been made. The proprietor of the convict has incurred the expense of feeding and clothing: the legislature cannot have intended to empower the governor to make an order for the mere purpose of making this a loss to him. [*Coleridge J.* A remission of the sentence would have that effect also.] In that case the governor would not have the power of assigning anew to another proprietor: the convict would probably remain in the service of the same master as a free labourer. Sect. 33 requires the governor to transmit the instrument of pardon to the secretary of state for the royal approbation, which protects parties from a capricious exercise of that power. [*Coleridge J.* There may be instances where the governor sees the assignment to have been an improper one, though the case be not a fit one for pardon. *Patteson J.* The governor has power to remit partially, and to revoke the remission: that looks like something more than a repeal of an unintentional repeal.] The act does not direct that the governor shall make any enquiry as to the propriety of

1839.

 BAYAN
 against
 ARTHUR.

1839.

 BRYAN
 against
 ARTHUR.

an assignment: had the power of revocation been absolute, some such provision would have been made. The statute seems, in fact, to put into legal language the former practice of the colony, which was to give a ticket of leave, at the expiration of which the convict returned into the service of the same master (a).

Sir *J. Campbell*, Attorney-General, contra. Under stat. 4 G. 1. c. 11., and subsequent acts, the contractor engaged to transport the offender at his own expense, and had a vested right in his services during the term. Under stat. 5 G. 4. c. 84. the system is altogether different: the contractor is merely the carrier, and has no interest in the services: they are vested in the governor, his assignees, and their assignees, toties quoties. [*Paterson J.* The governors could never take an interest where the offenders were consigned to others in the first instance.] In that case the property would be in the consignee, and so on again by assignment. Then it was found that the system was likely to be abused by improper assignments; and the only remedy existing was by pardon under sect. 9. Under that, however, the pardon could not be temporary. Perhaps the more reasonable view is that the power of remission vested in the governor by stat. 30 G. 3. c. 47. s. 1. still continued. On either view, however, there remained

(a) Sir *W. W. Follett* also referred to a judgment pronounced in one of the colonial courts: the Attorney-General remarked that the part which applied to the present question was extra-judicial, and that the judgment was inaccurate in referring the origin of transportation to stat. 4 G. 1. c. 11. See p. 110, note (a) *antè*.

Sir *W. W. Follett's* argument, as above, was heard on *Tuesday, November 12th*; the remainder of the argument on *Friday, November 15th*, before the same Judges.

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the inconvenience arising from a power of absolute assignment, and from the property in the offender being vested in the assignee till the punishment was completed or remitted. Therefore sect. 9 of stat. 9 G. 4. c. 88. gives the new power of revocation without or with pardon. [*Patteson J.* referred to stat. 2 & 3 W. 4. c. 62. s. 2.] That limits the power of the governor to remit, except after certain parts of the punishment have been undergone: but the power of revoking an assignment may be exercised at any time; and this is essential to carrying the policy of the act into effect. Nothing in the language of stat. 9 G. 4. c. 88. shews a design that the remitting should be a condition of the revocation. And the policy of the act affords an argument the other way. If the proprietor were tyrannical, or became insolvent, there would be good reason for revoking the assignment, but not for remitting the punishment. It is said that the power might be capriciously exercised by the governor: but he acts, like all public functionaries, on his responsibility. The same objection might be made to his exercise of the power of pardon.

Further, as the record is framed, it does not appear that the revocation was not immediately followed by a remission. The plea is good unless a revocation is bad where the remission is not actually contemporaneous.

Sir W. W. Follett, 'in reply. The intention of both parties was to obtain the opinion of the Court on the construction of the act. If the pleadings do not now raise the question, leave is prayed to amend.

The argument on the other side would shew that the governor can revoke an assignment, not only without

1839.

 BRYAN
against
ARTHUR.

1839.

 BRYAN
 against
 ARTHUR.

remitting the punishment, but without reassigning at all; for the act gives him no power to make a second assignment. Such a consequence cannot have been contemplated. Besides, this is an absolute revocation; sect. 9 of stat. 9 G. 4. c. 83. gives only a power to revoke "from time to time." So there is no general and absolute power of pardon, but only one of temporary or partial remission. If the object was, as the plaintiff contends, to set right a mistake in stat. 5 G. 4. c. 84., the inference is that the power was granted under the same conditions as before that act. [Patteson J. Why is stat. 9 G. 4. c. 83. s. 9. confined in its operation to *New South Wales* and *Van Diemen's Land*, if the mischief was general?] The object was to legalise the practice of granting tickets of leave, which had existed in those colonies only.

Lord DENMAN C. J. A doubt has been suggested as to the effect of the pleadings; but I think it better to assume that the record raises the general point. It seems to me that the language of sect. 9 of stat. 9 G. 4. c. 83. is so clear that it is impossible for us to enter into any speculation, independent of the words, as to the meaning of the legislature. I have not the smallest doubt that the power is expressly given to revoke from time to time; and this has been done. There is nothing done which prevents future revocations "from time to time." As to the incongruities which, it is said, appear from the history of the earlier acts, it is possible that they may make it difficult to say precisely what parliament intended; but the words are perfectly clear.

PATTESON

PATTESON J. We cannot collect from the words any meaning of parliament other than that for which the defendant contends. Sir *W. W. Follett* argues that the power to remit had been repealed; but it will not follow from this that stat. 9 G. 4. c. 83. s. 9. limits the power of revocation to the case of remission. Besides, sects. 32 and 33 refer to stat. 30 G. 3. c. 47., and recognise the power of remission both retrospectively and prospectively; we therefore cannot say that stat. 30 G. 3. c. 47. was repealed in this respect, though such a view might, perhaps, be suggested by looking at stat. 5 G. 4. c. 84. alone. Then we are left to the words of sect. 9 of stat. 9 G. 4. c. 83., which are so plain that we could not put upon them the restriction contended for, unless we were pressed by some very conclusive argument. I think, therefore, that the governor had an absolute power of revocation.

1839.

 BRYAN
against
ARTHUR.

WILLIAMS J. I am of the same opinion, and upon the same ground. I see nothing unreasonable in the governor having the power, though he might not think a remission of the punishment advisable, to revoke an assignment to a master who might turn out to be as bad as the convict himself. "From time to time" means, "as occasion may arise" for the exercise of the governor's discretion. There is nothing in the words of the act, or the reason of the thing, to restrict the power of revocation.

COLERIDGE J. There is no ambiguity in the words of sect. 9 of stat. 9 G. 4. c. 83. After the power of revocation is granted, there follows a power of remission, not to "such" offenders, but "to any offender or offend-

1839.

BRYAN
against
ARTHUR.

ders." To import the restriction contended for, would confine the act to a degree which nothing but a very strong reason, and almost a necessity, could warrant. It is said that we should do so on two grounds: first, the general policy shewn by the history of the statutes; secondly, the consequences to masters. As to the first, the argument has been ingeniously put; but it cannot be carried to the extent required: and my brother *Patteson's* argument respecting the non-repeal of stat. 30 G. 3. c. 47. is very strong. As to the second, it is true that cases of hardship may arise which would be checked by the construction for which the plaintiff contends, since a remission must be reported to the secretary of state. But consequences which are of greater weight, and indeed monstrous, would result from that construction. The interests of the convicts, and of the colony in general, were clearly more in view than those of the masters. Therefore we are not driven by the consequences to confine the clear meaning of the words.

Judgment for defendant.

1839,

The QUEEN *against* BROWNLOW and Others.Monday,
November 18th.

SIR W. W. FOLLETT obtained a rule, in *Michaelmas* term 1838, on reading certain affidavits, and the inquisition taken on 16th *June* then last, before *William Baker*, gentleman, one of the coroners for the county of *Middlesex*, on view of the body of *Andrew Brown*, then and there lying dead, requiring the said coroner, and the widow, if any, or next of kin, of the said *Andrew Brown*, and the Solicitors of the treasury, to shew cause why the said inquisition should not be quashed. It was admitted by Sir W. W. Follett, in argument, that the objections must be confined to what appeared on the face of the inquisition, which was as follows.

“Middlesex, to wit. An inquisition indented, taken” &c., at &c., “in the parish of *Saint Paul, Shadwell*, in the county of *Middlesex*, the 16th day of *June* in the 1st year of the reign” &c. (1 *Vict.*), “before *William Baker*, gentleman, one of the coroners of our said lady the Queen for the said county, on view of the body of *Andrew Brown*, a fireman, aged twenty-five years, now here

A coroner's inquisition on a dead body found that, on a day and at a place named, the deceased being on board a steam-boat then floating and being navigated in a river, by misfortune, &c., a boiler, containing water, and then and there forming part of a steam-engine on board the steam-boat and attached thereto, and which boiler was then and there used in working the steam-engine for the purpose of propelling the steam-boat along the river, and was then and there heated by a fire then and there also forming part of the steam-engine,

burst, whereby boiling water, and coals, &c., forming part of the fire, and which water and coals, &c., were then and there used in working the steam-engine, by misfortune, &c., were cast from the boiler and steam-engine upon the deceased, whereby he then and there received a shock, &c., and thereby became shaken, &c., of which shock, &c., the deceased instantly died, &c.; and that the boiler and steam-engine were the cause of the death and were moving thereto, and are of the value &c.

Inquest quashed, because no time was sufficiently laid for the time of the explosion, or for that of the death.

Quære, whether the inquisition was bad in making the steam-engine, as well as the boiler, deodand.

Quære, whether, if jurors' names be inserted at full length in the body of an inquisition, it is any objection, that some have signed the inquisition without giving their Christian names at full length, but only the initials.

Though the Court will sometimes quash an inquisition on motion, for palpable defects, the most convenient course is to put the party contesting it to demur.

1839.

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The QUEEN
against
BROWNLOW.

lying dead, upon the oaths of *Peter Mellish*," &c., "*John Thomas Lovell*, &c., and *Peter M'Donald*," (in all fourteen, all the Christian and surnames being set out at full length), "the several persons whose names are hereunder written and seals affixed, good and lawful men of the said county, duly chosen, and who, being now here duly sworn and charged to enquire, for our said lady the Queen, when, how, and by what means the said *Andrew Brown* came to his death, do, upon their oath, say that, on the 14th day of *June* in the year aforesaid, in the parish aforesaid, in the county aforesaid, the said *Andrew Brown* being on board of a certain steam-boat called the *Victoria*, which was then and there floating and being navigated on the water of a certain river called the river *Thames*, it so happened that, accidentally, casually, and by misfortune, a certain boiler, containing water, and then and there forming part of a certain steam-engine in and on board of the said steam-boat, and attached thereto, and which said boiler was then and there used¹ and employed in the working of the said steam-engine for the purpose of propelling the said steam-boat in and along the said river, and was then and there heated by means of a fire then and there also forming part of the said steam-engine in the said steam-boat, burst and exploded, and became² dirupt and broken, whereby, and by means whereof, a large quantity, to wit ten gallons, of the boiling and scalding water and steam then and there being within the cavity of the said boiler, and a large quantity, to wit half a bushel, of hot and burning cinders and coals forming part of the said fire, the said boiling and scalding water and steam and the said cinders and coals being then and there used and employed

ployed in the working of the said steam-engine, accidentally, casually, and by misfortune, were cast, thrown, and came, from and out of the said boiler and steam-engine, with great force and violence, to, upon, and against the face, head," &c., "of him the said *Andrew Brown*; whereby he, the said *Andrew Brown*, then and there received, in and upon his said face," &c., "one mortal shock and concussion, and divers mortal scalds and burns, and thereby became mortally shaken, scalded, and burnt; of which said mortal shock and concussion, and of which said mortal scalds and burns, he, the said *Andrew Brown*, at the parish aforesaid, in the county aforesaid, *instantly* died. And so the jurors" &c., "do say that he, the said *Andrew Brown*, in manner and by the means aforesaid, accidentally, casually, and by misfortune, came to his death, and not otherwise, and that the said boiler and steam-engine were the cause of the death of the said *Andrew Brown*, and were moving thereto, and are of the value of 1500*l.*, and are the property and in the possession of *William Batchelor Brownlow*, and" &c. (twelve others named). "In witness whereof, as well the said coroner as the foreman and the rest of the said jurors, have to this inquisition set their hands and seals, on the day and year, and at the place, first above written.

"*William Baker*, coroner. (L. s.)"

Then followed the signatures and seals of all the jurors with the Christian and surnames at full length, except in the case of *M'Donald* and *Lovell*, who signed as follows.

"*P. M'Donald*." (L. s.)

"*John Thos. Lovell*." (L. s.).

1839.

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The QUEEN
against
BROWNLOW.

In

1889.

The QUEEN
against
BROWNLOW.

In this term (a),

Sir J. Campbell Attorney General, Sir F. Pollock, and Wightman, shewed cause. The more convenient course would be to traverse the inquisition, if the facts be denied, or to demur, if the objection be on a point of law, so that the matter might, if the parties thought fit, be again discussed before a court of error. In *Rex v. Evett* (b) the inquisition was removed into this Court; and the owner of the property, a venire having been issued against him, appeared and demurred to the inquisition. In *Regina v. The Grand Junction Company*, last term, this Court refused to quash an inquisition for a defect said to be apparent on the face of it.

One objection will be that two of the jurymen appear to have signed the inquisition without the full Christian names. That was held to be a fatal defect in *Rex v. Evett* (b); but there the names did not appear at full length in any part, for they were not inserted in the body of the inquisition; so that, unless the Court looked at the signatures, it could not know who the jurors were. Here the names are inserted in the body of the inquisition at full length. That is sufficient, as in cases under the Statute of Frauds; and, the names being in the inquisition, it seems to be the more correct practice for the jurors to sign as they usually sign. What is to be done in the case of a juror who can sign only by his mark? In *Rex v. Bennett* (d) Gurney B. thought it enough for a juror to sign an abridged Christian name, where the names were set out at length in the inquisition. Indeed, if the

(a) Thursday, November 14th. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) 6 B. & C. 247.

(c) See post, p. 128., note (a).

(d) 6 C. & P. 179.

Court do not look at the inquisition, it does not appear how they are to know that the names are not simply "P." and "John Thos."

1839.

The Queen
against
BROWNLOW.

A second objection will be that both the boiler and steam-engine are made deodand. The inquisition finds both to be the cause of the death, and moving thereto; and this must be taken as true in the present proceeding. Indeed the fact probably was so. In 1 *Hawk. Pl. Cr.* 162. B. 1. c. 26. s. 6. (a) it is said that, "wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also; for the rule is, *omnia quæque movent ad mortem sunt deodanda*." Why is it to be said that the engine did not move to the death? The working of the engine is, in all probability, that which produced the bursting of the boiler. And it is found that the boiler is part of the engine.

Thirdly, it will be objected that the inquisition does not find the day of the death. In 1 *Hawk. Pl. Cr.* 162. B. 1. c. 26. s. 7. (a) it is said, "if the party wounded die not of his wound within *a year and a day* after he receive it, there shall be nothing forfeited, for the law does not look on such a wound as the cause of a man's death, after which he lives so long; but if the party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever in the mean time." Here it is said, "of which said mortal shock and concussion, and of which said mortal scalds and burns, he, the said *Andrew Brown*, at the parish aforesaid in the county aforesaid,

(a) 7th (*Leach's*) ed.

instantly

1839.

The QUEEN
against
BROWNLOW.

instantly died." The word "*instantly*" refers the death to the moment of the infliction of the shock, concussion, scalds, and burns, which are laid to have been received "then and there," that is, on 16th June, 1st Victoria. "*Instantly*" is plainly equivalent to "then." The jury may not know the exact day. [Lord Denman C. J. Then would it not be right to state so?] In 3 Hawk. Pl. C. 333. B. 2. c. 23. s. 88. it is said that, in appeals of death, the day of the death, as well as of the hurt, must be set forth, that it may appear that the party died within the year and day; but it is added, sect. 89, "it hath been holden that an allegation of the day, *primâ facie* somewhat uncertain, may be holpen by the apparent sense of the whole; as where it is alleged, that the principal such a day made the assault and gave the stroke, and that the party died on such a subsequent day, &c. and that *A. B.* was *adtunc et ibidem abettans* the said principal to do the felony and murder aforesaid; in which case it is said that the words *adtunc et ibidem*, from the manifest import of the whole, shall be referred to the time of the stroke; because by that only the felony, which *A. B.* is charged to have abetted, was done." *Instantly* is surely strong enough to satisfy the rule so laid down. [Lord Denman C. J. Instantly on what? The inquisition states several matters before.] The word refers to the last allegation of time, just as "then" does. In *Taylor v. Welsted* (a) a declaration in trespass stated that the defendant, on a day and at a place named, assaulted the plaintiff, and *adtunc et ibidem* beat and wounded him, and a bag, of the value &c., took and carried away; and error was

(a) Cro. Jac. 443.

brought,

brought, because there was no *ad tunc et ibidem* in the statement of taking the bag; "but the Court held that it was well enough; for 'et' accouples it with the time and place of battery." Here every allegation is preceded by an "and."

1839.

—
The QUEEN
against
BROWNLOW.

Sir *W. W. Follett*, *Platt*, and *Kelly*, *contra*. This is a common proceeding for questioning an inquisition. [Lord *Denman* C. J. It is not a convenient one: it would be better to have a concilium, on which one counsel only can be heard on each side. An inquisition is sometimes quashed on motion at the assizes; but there it is convenient, because a party is in immediate jeopardy.]

As to the signatures: *Rex v. Bennett* (a) certainly is against the objection; but that was only the decision of a single judge at *Nisi Prius*. It is true that in *Rex v. Evett* (b) the names did not anywhere appear at full length. [*Patteson* J. Nor in *Rex v. Bowen* (c).]

Secondly, no reason can be given for making the steam-engine a deodand, which would not equally justify levying on the whole steam-vessel. Death has happened from the explosion of a steam cooking apparatus fixed to a house: is the whole house to be a deodand? It is suggested that the working of the engine might contribute to the bursting; but there is no averment in the inquisition to support that? From 1 *Hal. Pl. C.* 419—422., 1 *Hawk. Pl. Cr.* 162. B. 1. c. 26. ss. 5, 6. (d), *Com. Dig. Waife*, (E 1.), (E 2.), and *Foxley's Case* (e), it appears that, where death is caused by a thing in motion, nothing which does not contribute to the motion that pro-

(a) 6 C. & P. 179.

(b) 6 B. & C. 247.

(c) 3 C. & P. 602.

(d) 7th (*Leach's*) ed.

(e) 5 Rep. 110 b.

duces

1839.

—
The QUEEN
against
BROWNLOW.

duces the death is a deodand: and, where the death is caused by any thing not in motion, there only the thing so causing shall be a deodand; as where a man falls from the wheel of a cart which is standing still. The cases are collected in *Jervis on the Office and Duties of Coroners*, pp. 201—3. Here neither the engine nor the vessel is alleged to have been in motion. If they were, the engine is moved by the boiler, not the boiler by the engine. [Lord Denman C. J. Can we take notice, in this proceeding, of the boiler not being part of the steam-engine?] A mill cannot be a deodand for death caused by a wheel forming part of it; *Com. Dig. Waife*, (E 2.).

Thirdly, the day of the death should be found. All the precedents in *Jervis on Coroners* are so. It is true that, after a day has been laid, the death may be connected with that day by the word “then.” But “instantly” has no such effect. It means a time shortly after the time before stated. In *Taylor v. Welsted* (a) the whole allegation was connected with the *adtunc et ibidem*. In the passage cited from 3 *Hawk. Pl. Cr.* 333. B. 2. c. 23. s. 89. the *adtunc et ibidem* were referred to the material allegation. If the jury do not know the day, the finding should be, “on a day to the jurors unknown, and within a year and a day” of the blow, &c. This is a defect which could not be helped by verdict; 4 *Hawk. Pl. Cr.* 45. B. 2. c. 25. s. 77. And the necessity for such allegations in indictments appears from 1 *Russ. on Crimes*, 470 (b).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

(a) *Cro. Jac.* 443.

(b) 2d ed. See now, as to indictments, stat. 7 G. 4. c. 64. s. 20.

On

On the objection first taken, we should be very loth to set aside an inquisition for supposed absurdity and inconsistency in statement of facts, without seeing beyond all doubt that those qualities belonged to it.

1839.
The QUEEN
against
BROWNLOW.

Whether such be the case here it is not necessary to enquire, as we are satisfied that there are two defects in the finding, which, though technical in their nature, must be held fatal according to the known rules of pleading.

First, There is no time stated for the explosion of the boiler. "On the 14th day of *June*," &c., the deceased "being on board the steamer, the boiler exploded," &c. Here is no averment of any day when that fact occurred; and we are bound by the authority of *Cotton's Case* (a) to hold that this form of averment refers the day to the circumstance of the deceased being on board, and does not apply to the fact of the explosion.

Secondly, "Of which said mortal shock" &c., *A. B.*, at the place aforesaid, "instantly died." It is contended that *instantly* is equivalent to *then*, which word was employed immediately before in connexion with the shock described; and that word is admitted to be sufficient. We think it not equivalent. "*Then*," "*adunc*," means the very time at which the other event happened; it therefore involves the same day; and such is the known sense of the term in pleading. But of *instantly* the more natural and usual sense is, instantly *after*; we do not know what the pleader may mean by that allegation; possibly five minutes, or an hour, some time on the succeeding day, or even a longer time. By the course

(a) *Cro. Eliz.* 738. See, as to the effect of an allegation introduced by a participle, *Rea v. Somerton*, 7 B. & C. 463.

1839. . of precedents such words as *instanter* and *incontinenter* do not dispense with a direct allegation of time: we repeatedly find them associated with it.

The QUEEN
against
BROWNLOW.

We were pressed to put the party to his demurrer, which we shall be inclined to do where any degree of doubt can exist. It is by much the most convenient course. But, on the present occasion, after so full an argument, we do not think ourselves at liberty to refuse to act on our opinion by quashing the inquisition on motion, a practice which has certainly prevailed for more than a century.

Rule absolute (a).

Thursday,
May 30th,
1839.

(a) The QUEEN against The Grand Junction Railway Company.

It is no objection to a coroner's inquisition *super visum corporis*, that it purports to be taken in county *A.*, whereas the cause of death appears by the finding to have occurred in county *B.* Admitted.

A coroner's inquisition stated that the proprietors of two locomotive engines carelessly and improperly caused and permitted them to be used on a railway, by means of which negligence, carelessness, and improper using, and causing, &c., the engines were propelled against each other, and a person riding on one of them was killed; that the engines were moving to and the cause of the death, and were of the value respectively of &c., and the property of &c.; and that the jury exonerate the men employed on the engines from blame.

Quære, whether, on such a finding, the engines, as having moved to the death of the party killed, are *deodand*?

At all events, where the facts are so stated, the Court will not quash the inquisition, entirely or in part, on the ground that, upon such inquisition, a *deodand* may be improperly claimed.

engines

CRESSWELL, in *Michaelmas* term 1838, obtained a rule calling on *William Henry Seymour*, gentleman, a coroner for the county of *Warwick*, and also upon the widow, if any, or the next of kin, of *Thomas Horton*, and also upon the Solicitors for the affairs of her Majesty's treasury, to shew cause why an inquisition taken by the said coroner on the view of the body of the said *Thomas Horton* should not be quashed: notice of the rule to be given to the coroner, the widow, if any, or next of kin, of *T. H.*, and the Solicitors for the treasury.

The inquisition (venue *Warwickshire*) purported to be taken at the house of &c., in the parish of *Birmingham*, in the county of *Warwick*, before the said coroner, on &c., on view of the body of *Thomas Horton* then and there lying dead, upon the oaths of &c. The jurors found that heretofore, to wit on &c., at *Perry Bar*, in the parish of *Handsworth*, in the county of *Stafford*, the Grand Junction Railway Company were the owners of certain locomotive pilot engines called, respectively, the *Merlin*, and the *Basilisk*, and then and there respectively used by them on a railway there situate, for the purpose of conveying persons &c.; and which said

engines were to be used on a railway, by means of which negligence, carelessness, and improper using, and causing, &c., the engines were propelled against each other, and a person riding on one of them was killed; that the engines were moving to and the cause of the death, and were of the value respectively of &c., and the property of &c.; and that the jury exonerate the men employed on the engines from blame.

engines were then and there respectively propelled, &c., by steam. That it then and there became and was the duty of the said Company to use and cause to be used due and proper care and diligence in the management and conduct of the said engines while the same were so travelling, &c. That afterwards, to wit on 19th March &c., at *Perry Bar*, in the parish &c., in the county of *Stafford* aforesaid, the said Company negligently, carelessly, and improperly used, and caused and procured and permitted and suffered to be used, the said engines, for the purpose of travelling and passing along and upon a certain part of the said railway of the said Company there situate, to wit at *Perry Bar* &c. ; by means of which negligence, carelessness, and improperly using, and causing and procuring and permitting and suffering to be used, the said engines as last aforesaid, it so happened that the said engines were then and there propelled, driven, and forced with great violence, to, at and against each other, and the said *Thomas Horton* then and there sitting, being, and riding in and upon a certain part, to wit the tender attached to the said engine called the *Merlin*, was by means thereof forced to, at, against and between the tender attached to the said engine called the *Merlin* and the step of the said engine called the *Merlin*, and was also thereby then and there forced, cast, and thrown into and against the fire, there being and burning in a certain part of the said engine called the *Merlin* ; and thereby then and there, by such forcing, &c., giving unto the said *Thomas Horton* divers mortal bruises, wounds, &c. ; of which said mortal bruises, wounds, &c., he the said *Thomas Horton* from the said 19th March in the year aforesaid, until the 20th day of the same month, as well at *Perry Bar*, &c., in the county of *Stafford* aforesaid, as at the several parishes of *Aston* and *Birmingham* aforesaid, in the county of *Warwick* aforesaid, did languish and languishing did live, and then, to wit at the said parish of *Birmingham*, in the said county of *Warwick*, on the said 20th day of March in the year aforesaid, the said *Thomas Horton* of the said mortal bruises, wounds, &c., did die : and so the jurors, &c., do say that the said *Thomas Horton* came to his death in manner and by the means aforesaid, and not otherwise : and that the said locomotive pilot engine called the *Basilisk*, and the said locomotive pilot engine called the *Merlin*, and the tender of the said last-mentioned engine attached, were severally moving to and the cause of the death of the said *Thomas Horton* ; and that the said locomotive pilot engine called the *Basilisk* is of the value of 150*l.* ; and that the said locomotive pilot engine called the *Merlin*, and the tender thereto attached, are of the value of 150*l.* ; amounting in the whole to 300*l.* ; and are the property and in the possession of the said Grand Junction Railway Company : and the jurors aforesaid, upon their oath aforesaid, do further present that they do perfectly exonerate the men employed on the said two engines called the *Merlin* and the *Basilisk* from any blame whatever arising from the above transaction.

The motion was grounded on two objections. First, that the inquisi-

1839.

The QUEEN
against
The
Grand Junction
Railway
Company.

1839.

The QUEEN
against
The
Grand Junction
Railway
Company.

tion was taken in *Warwickshire*, whereas the cause of death happened in *Staffordshire*. As to this, 2 stat. 4 Ed. 1., *De officio coronatoris*, was referred to on the subsequent discussion of the rule; but the point was ultimately abandoned. Secondly, that a deodand became due only where the death happened by mischance, whereas here the cause of death appeared by the finding to have been negligence.

Sir J. Campbell, Attorney General, and *Wightman*, now shewed cause. The proper course for questioning this inquisition would have been to demur or traverse. With regard to the second point: supposing the inquisition erroneous as to the deodand, yet, if it be not wrong throughout, it cannot be quashed. But the objection is unfounded. Even in the case of murder, an indictment states the value of the weapon, contemplating that it may be a deodand; and this was considered important, in ancient times, because masses for the person killed were to be paid for from the value found; 1 *Bla. Com.* 300. If the death here is attributable to the men who were employed on the engines, the inquisition itself exonerates them from blame; and therefore a deodand may be claimed, even on the principle maintained on the other side. But, supposing that the Company are to be considered as having caused the death by omitting proper care and enquiry, still, if a deodand is due in case of murder, it is so here *à fortiori*; and Lord Coke says, 3 *Inst.* 57., that, "If *A.* killeth a man with the sword of *B.* the sword shall be forfeit to the king as a deodand, because *movet ad mortem*, and for default of safe keeping of the same by the owner."

Cowling, contra. If the inquisition is bad as to the deodand, that part of it may be quashed and the rest stand: *Ex parte Carruthers* (2 *Man. & R.* 397.). The rule, as to deodands of moveable things, is that all which moved to the death is deodand: that does not apply where the thing is in fact a mere instrument. In indictments for murder, the value of the weapon is stated, because it is part of the felon's chattels, which would be forfeited to the crown. [Lord Denman C. J. That does not apply if *A.* kills a man with the knife of *B.*] If lent to the felon, it would be forfeited. In 3 *Inst.* 57. the instance given on the other side is adduced; but the general statement is, that "deodands" are "when any moveable thing inanimate, or beast animate, do move to, or cause the untimely death of any reasonable creature by mischance," "without the will, offence, or fault of himself, or of any person." "Move to, or cause," there, must mean that the thing is the sole mover or cause. *William of Darenty's Case* (1 *Hal. Pl. C.* 420,) and many authorities cited in *Com. Dig. Waif*, (E. 1.), and 2 *Bac. Abr. Deodand*, p. 632. (7th ed.), support this view of the law. An improper use of the word deodand appears to have arisen from confusing the law on this head with the law of forfeiture, which does not arise where there is no felony. Probably there was no deodand in cases of justifiable homicide. There is now no forfeiture in any case of killing without felony; stat. 9 G. 4. c. 31. s. 10. In *Foster's Crown Law*, 265. Discourse 2. c. 1. sect. 5., it is said that "Accidental death

death which happeneth without the intervention of human means induceth a forfeiture which the ignorance and superstition of ancient times called a *deodand*." In *Jervis, On the Office and Duties of Coroners*, Appendix to c. 7., p. 362. et seq., many precedents of inquisitions are collected, in which *deodands* are given; and all are in cases where the death of the party has been accidental, and without any other person's default. [Lord Denman C. J. How does it appear in this case that a *deodand* would be levied under the inquisition as it stands?] The engines are stated to have been moving to, and the cause of, the death. [Lord Denman C. J. According to your argument no right to a *deodand* would attach, upon this statement of the death. We need not decide any thing as to the right. Patteson J. The inquisition finds negligence in the company as the cause of the accident.]

LORD DENMAN C. J. All that is stated in this inquisition might be true, and yet, according to your argument, nothing be forfeited. There is nothing for us to set aside. In *Ex parte Carruthers* (2 Mann. & R. 397.) the finding as to *deodand* was quashed, but that was for uncertainty. The parties applying will, if the argument be correct, have an opportunity of protecting their rights, if it be attempted to use the inquisition for the purpose of claiming the *deodand*. The rule must be discharged.

LITLEDALE, PATTESON, and WILLIAMS Js. concurred.

Rule discharged.

See *Stamford's Pleas of the Crown*, f. 20 a. Book 1. c. 12.

GRIFFITS *against* PAYNE.

Tuesday,
November 19th.

ASSUMPSIT, on several bills of exchange, by indorsee against acceptor. Pleas, as to each bill, that defendant did not accept; and issues thereon.

On the trial, before Tindal C. J., at the last Surrey assizes, the bills were produced. They were all drawn by a person named *Skull*, in 1837, on the 17th May, 17th July, 20th September, 22d November, 27th November, respectively; payable, the fourth at three

Assumpsit by indorsee against acceptor of a bill; plea, non acceptit; defence, that the alleged acceptance was a forgery. Defendant offered evidence that a collection of bills, having on them forgeries of his signature, had been in

plaintiff's possession, and that some of such bills had been circulated by him. Held inadmissible, unless distinct proof were given that the bill on which the action was brought had formed part of the collection.

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months,

1839.

The QUEEN
against
The
Grand Junction
Railway
Company.

1839.

 GRIFFITS
 against
 PAYNE.

months, the other four at two months, after date; the first and last for 40*l.*, the other three for 50*l.* The defendant's name appeared on each as acceptor; and evidence was given, by the plaintiff to prove the handwriting, and by the defendant to prove that the signatures were forged. For the defendant, also, *Skull's* wife was called, who deposed that *Skull* had suddenly left his house on 27th *April* 1837; two days after which the plaintiff's brother, *Thomas Griffiths*, called at *Skull's* house, asked *Skull's* wife for her husband's books, bills, and cash box, and took away the cash box, all the bills he could find, and other papers besides. It was then proposed to prove that, among the bills so taken, either loose or in the cash box, were several bills on which the defendant's signature appeared, which signature was forged; and that the plaintiff had been circulating such forged bills since; and it was contended, on the part of the defendant, that the jury would be at liberty to infer, if they thought fit, that the bills on which the action was brought formed part of the bills so taken from *Skull's* house. This evidence was objected to on behalf of the plaintiff; and the Lord Chief Justice rejected it. Verdict for the plaintiff. In this term (*a*),

Petersdorff moved for a new trial, on account of the rejection of this evidence. It is not easy to state any general principle determining what facts are to be excluded, as merely collateral. But here the jury might have inferred that the dealing with all the bills, including those on which the action was brought, was a single transaction. [Lord *Denman* C. J. Could you give such

(*a*) *Friday, November 8th.* Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

evidence

evidence on an indictment for forgery?] That test was suggested at Nisi Prius by *Tindal* C. J.; but it seems too strict. Yet, even on such an indictment, guilty knowledge in the particular instance may be proved by other transactions; *Rex v. Wylie* (a): and, generally, in criminal cases evidence may be given of a criminal act, distinct from that which is the subject of the indictment, if the whole form one transaction; *Rex v. Ellis* (b). *Gibson v. Hunter* (c) is an authority for the admission of this evidence; and the case seems to fall within the principle of *Barber v. Gingell* (d). The learned Judge would have admitted this evidence if there had been distinct proof that the bills on which the action was brought were among those taken: if so, the evidence was admissible as one step in establishing that material fact. [*Patteson* J. There are two Nisi Prius cases against you; *Viney v. Barss* (e) and *Balcetti v. Serani* (g).] In both those cases the plaintiff was a bonâ fide party: here the evidence proposed was that the plaintiff had dealt with the other forged instruments, and his bona fides was impeached.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

We think the Lord Chief Justice did right in excluding the evidence offered, as it clearly would have been inadmissible on an indictment for forgery, and therefore was so on this issue.

Rule refused.

(a) 1 *N. R.* 92.

(b) 6 *B. & C.* 145.

(c) 2 *H. Bl.* 288.

(d) 3 *Esp.* 60.

(e) 1 *Esp.* 293.

(g) 1 *Peake's N. P. C.* 192. (3d ed.).

1839.

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GRIFFITHS
against
PAYNE.

1839.

Thursday,
November 21st.

The QUEEN *against* The Justices of
BEDFORDSHIRE.

(In the Matter of FOSTER.)

A party convicted by two justices in special sessions under the general highway act, 5 & 6 W. 4. c. 50. ss. 47, 103., on information by one of the surveyors, cannot be heard on appeal to the quarter sessions under sect. 105, unless he has served notice on both the convicting justices.

It is not sufficient that he has served notice on the surveyors, and has also served a notice on one of the justices, addressed to both, which that justice has transmitted to the clerk of the special sessions, with an observation to him that he will know how to act upon it.

WILLIAM FOSTER was convicted by two justices of the division of *Amphill, Bedfordshire*, in special sessions, under stat. 5 & 6 W. 4. c. 50. ss. 47, 103., of having unlawfully taken away materials gotten for the repair of the highways of *Cranfield* parish, and lying by the side of a highway. The information was laid by one of the surveyors. *Foster* appealed against the conviction on several grounds, one of which was that the justices had not jurisdiction. The appeal came on for hearing at the *Bedford* quarter sessions, *January* 1839, when it was stated by the respondents' counsel, and admitted by the counsel for the appellant, that the notice of appeal had been served on one only of the convicting justices, *Mr. Newland*. The notice was addressed to the surveyors and the two convicting justices, and had, in fact, been served upon the surveyors, and on *Mr. Newland*, who, on the suggestion of the appellant's attorney, transmitted the notice to the clerk of the special sessions. The appellant's attorney was prepared to prove the circumstances as to the notice, at the quarter sessions, but the sessions held that service of notice upon both the convicting justices was essential, and, on this ground, dismissed the appeal. A rule nisi was obtained, in *Hilary* term, 1839, on affidavit of these facts, for a mandamus to the sessions to hear the appeal. The affidavits in answer stated that

that the service on the surveyors and Mr. *Newland* was admitted at the sessions, but no proof tendered as to the serving notice upon, or transmitting it to, any other person, the appellant's counsel relying merely on the sufficiency of notice to one magistrate: that the justices' clerk did, in fact, receive the notice sent as above mentioned, with a letter from Mr. *Newland*, saying that the clerk would, of course, know how to act upon it; but that no intimation was ever given to the clerk that such notice came from the appellant or his attorney, or that either of them wished it to be considered as notice to the other magistrate.

1839.

The QUEEN
against
The Justices of
BEDFORDSHIRE.

Gunning now shewed cause. Sect. 105 of stat. 5 & 6 W. 4. c. 50. enacts that, if any person shall think himself aggrieved by any rate &c., "or by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person in pursuance of this act, and for which no particular method of relief hath been already appointed," he may appeal to the next general or quarter sessions, first giving notice in writing "to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved," of his intention to appeal, and of the grounds of such appeal; in default of which notice it shall not be lawful for such appellant to be heard at the sessions. Here the surveyors were not the parties by whose act the appellant was aggrieved; the justices, both of whom signed the conviction, were the parties entitled to notice. The expression used in sect. 105 is "notice" "to such justice or other person;" but by the interpretation clause, sect. 5, the singular number, in this act,

K 4

includes

1839. includes several persons as well as one, "unless there be something in the subject or context repugnant to such construction." The communication to the justices' clerk was not a communication to the second justice; and no evidence of it was given at the quarter sessions. The notice was addressed to both justices: but that will not render a service of it upon one equivalent to a service on both; *Rex v. The Justices of Norfolk (a)*. It is evident from the judgment of Taunton J. in that case that, where individuals ought to be personally informed of an appeal, there, in the absence of any legislative provision to the contrary, the service ought to be upon both. It was stated here, as a ground of appeal, that the justices had acted without jurisdiction; had that been so, each was liable to an action, and each, therefore, should have been served with notice (b). It was held in *Rex v. The Justices of Warwickshire (c)* that notice of the grounds of appeal against an order of removal might be well given to one of several overseers: but those officers stand in a very different situation from justices, and are, for some purposes, a corporation. It has been held, as to justices, that, where two convict under a statute which gives one justice a power to convict singly, yet the notice of an application for a certiorari to remove the conviction must be served on both; *Rex v. Baldwin (d)*.

The QUEEN
against
The Justices of
BEDFORDSHIRE.

Byles, contra. The parties to whom notice was essential here were the surveyors; they were the parties

(a) 2 B. & Ad. 944.

(b) See *Regina v. The Manchester and Leeds Railway Company*, 8 A. & E. p. 424, note (a).

(c) 6 A. & E. 873.

(d) 1 *Gude's Practice of the Crown Side of K. B.* 222.

appealed

appealed against; *Rex v. The Justices of Hants*(a): and therefore, as the same case shews, they, and not the convicting justices, would have been liable to costs under sect. 105 if the appeal had been successful. Notice to one surveyor would have been sufficient; in this respect the case of a surveyor is not substantially distinguishable from that of an overseer; and, therefore, *Rex v. The Justices of Warwickshire* (b) applies. And, if notice to one of the surveyors, who are interested in the result of the appeal, would suffice, it would seem sufficient also to serve notice on one of the justices who are not liable to costs under sect. 105. But, if the express words of that section make notice to both surveyors necessary, then, in the same strictness, one justice only need receive notice, for the words are, "giving" "to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved, notice." It is not clear, indeed, on these words that the justice need be served with notice at all, if the surveyors have it. The notice here was addressed to both justices, though delivered only to one; and there would often be great practical inconvenience, if an actual service upon two convicting justices were necessary to give the right of being heard on appeal.

Lord DENMAN C. J. This rule must be discharged. Under the terms of sect. 105, the persons by whose act the appellant thought himself aggrieved were the justices: therefore notice should have been served on both.

(a) 1 B. & Ad. 654.

(b) 6 A. & E. 873.

1839.

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The QUEEN.
against
The Justices o.
BEDFORDSHIRE.

1839. **PATTESON J.** There is a difference between the case of justices and that of overseers of the poor in the instance which has been referred to. When justices act, they do not act jointly: the overseers form a body, but each justice is individually liable in trespass. The rule must therefore be discharged.

**The QUEEN
against
The Justices of
BEDFORDSHIRE.**

WILLIAMS J. concurred.

COLERIDGE J. The enactment of sect. 105 is, "that if any person shall think himself aggrieved by any rate made under or in pursuance of this act, or by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person in pursuance of this act," he may appeal, giving notice to the surveyor or surveyors, or to such justice or other person by whose act he shall think himself aggrieved. The persons by whose act the appellant here thought himself aggrieved were both the justices. The notice to surveyors appears to be required in the case where a party thinks himself aggrieved by a rate.

Rule discharged (a).

(a) See the next case.

[1840.]

The following case was decided in *Hilary* term, 1840.
 The QUEEN *against* The Justices of CHESHIRE.
 (In the Matter of RIGBY.)

[Tuesday,
 January 14th,
 1840.]

FRANCIS RIGBY, licensed victualler, was convicted by two justices, Sir *Richard Brooke* and Mr. *Jacson*, in petty sessions, under stat. 9 G. 4. c. 61. (a) s. 21., of

(a) Stat. 9 G. 4. c. 61. s. 21. imposes penalties (on conviction by two justices) for offences against the victualler's license.

Sect. 27 enacts "That any person who shall think himself aggrieved by any act of any justice, done in or concerning the execution of this act, may appeal against such act to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen, unless such session shall be holden within twelve days next after such act shall have been done, and in that case to the next subsequent session holden as aforesaid, and not afterwards, provided that such person shall give to such justice notice in writing of his intention to appeal, and of the cause and matter thereof, within five days next after such act shall have been done, and seven days at the least before such session, and shall within such five days enter into a recognizance, with two sufficient sureties, before a justice acting in and for such county or place as aforesaid, conditioned to appear at the said session, and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded;" "and the Court at such session shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the said Court shall seem meet."

Sect. 29 enacts that wherever, after notice of appeal, the appeal shall have been dismissed or abandoned, or the judgment appealed against shall have been affirmed, the Court of appeal shall "adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum, by way of costs, as shall in the opinion of such Court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal." And where the judgment is reversed, the Court is empowered, if it think fit, to order payment to the justice, by the treasurer of the county or place, of such sum as will indemnify the justice from all costs, &c.

A licensed victualler, convicted by two justices under stat. 9 G. 4. c. 61. s. 21. of an offence against the tenor of his license, cannot be heard on appeal to the quarter sessions under sect. 27, unless he has served notice of such appeal on both the convicting justices.

And this, although at the time of giving notice the conviction had in fact been signed only by that justice: at least, if there be no proof that the conviction so signed was communicated to the appellant before he gave notice, so that he might have been misled thereby.

an

[1840.]

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The QUEEN
against
The Justices of
CHESHIRE.

an offence (specified in the conviction) against the tenor of his license. A pecuniary penalty was awarded (under sect. 26), one half to the informer, the other half to be paid to the county treasurer. *Rigby* appealed against such conviction to the quarter sessions, under sect. 27 of the act, first entering into recognizances as that section requires, and serving a notice of appeal on Sir *R. Brooke*, addressed to him as "chairman of a meeting of magistrates held" &c. (when the conviction took place), and stating grounds of appeal on the merits of the case. The appeal was called on at the *Knutsford* quarter sessions in *January* 1839, when counsel appeared on behalf of Mr. *Jacson*, and contended that the appeal could not be gone into, inasmuch as he had not had notice. The sessions thereupon immediately refused to hear the appeal, and dismissed it with costs to be paid by the appellant. *Cottingham*, in *Hilary* term, 1839, obtained a rule nisi for a mandamus to the sessions to enter continuances and hear the appeal. The attorney who acted for the appellant at the quarter sessions deposed, in support of the rule, that he obtained at the quarter sessions what he was led to believe was a copy of the conviction; that it bore only the signature of Sir *R. Brooke*; and that, if any other signature was afterwards obtained, the deponent had no doubt it was procured at the sessions. An affidavit in answer denied that Sir *R. Brooke* was chairman at the petty sessions in question; and stated, further, that Mr. *Jacson's* clerk did at the quarter sessions deliver to the respondent's counsel a copy of the conviction, made before *Jacson's* signature had been obtained, which copy, without *Jacson's* name, was, out of courtesy, handed to the counsel or attorney for the appellant; but that the conviction was
duly

duly filed at those sessions, *Jacson's* name being first [1840.]
affixed.

The QUEEN
against
The Justices of
CHESHIRE.

Cresswell and *Townsend* now shewed cause, and cited
Regina v. The Justices of Bedfordshire (a). The Court
then called on

Cottingham, contra. This motion was made on the
authority of *Rex v. The Justices of Staffordshire (b)*,
where the dicta of two of the learned Judges are
express on the point now before the Court. And this
case differs from *Regina v. The Justices of Bedford-
shire (a)*, because here the conviction was not, in fact,
signed by more than one justice, till the quarter ses-
sions. Stat. 9 G. 4, c. 61. s. 27. obliges the appellant
to give his notice of appeal within five days next after
the act done; if several justices convicted, it might not
be possible to serve all within the time. That section
requires that notice of appeal shall be given to such
"justice," though, indeed, there is an interpretation
clause, sect. 37, by which the singular word may be
construed as plural. But any notice to the justices
here was a mere formality, since they were not inter-
ested in the result of the appeal: the interested party
was the informer, who was to receive half the penalty,
according to sect. 26 of the statute. [*Coleridge* J.
Might not the justices have been subjected to costs?]
That was in the discretion of the quarter sessions.
[*Lord Denman* C. J. The case you cite was not men-
tioned in *Rex v. The Justices of Bedfordshire (a)*; but

(a) *Antè*, p. 134. In that case a minute of the conviction, signed by
both justices, was sent by their clerk to the appellant's attorney at his re-
quest, to enable him to prepare his notice of appeal. Nothing was there
stated to this court as to the conviction returned at the quarter sessions.

(b) 4 A. & E. 842.

[1840.] we knew that there were authorities each way, and we took the course which appeared to us the most proper. Here there is a peculiarity, that the copy delivered to you was, as you state, signed only by one justice.] Mr. *Jacson* did not sign till after the appeal was lodged. He might legally do the act then; but the appellant could not know that more than one justice had signed.

The QUEEN
against •
The Justices of
CHESHIRE.

Cresswell, contra. It does not appear by the affidavits that any copy of the conviction was given to the appellant before the sessions, by which he could have been misled: therefore the fact stated as to the signature could not affect the notice. (He was then stopped by the Court.)

Lord DENMAN C. J. That gets rid of the difficulty. The appellant knew only of a conviction by two justices. At the sessions a conviction was produced, signed only by one: but the other might sign it then; and the previous want of signature could not have affected the notice. The rule must be discharged.

LITLEDALE and COLERIDGE Js. concurred (a).

Rule discharged.

(a) *Williams J.* was sitting on the special commission at *Monmouth*, for the trial of *Frost* and others, charged with high treason.

1839.

The QUEEN *against* HAWDON and Others.*Thursday,*
November 21st.

THE defendants were indicted for a libel; and a count was added, charging a conspiracy. They removed the indictment by certiorari, and entered into the usual recognizances. On the trial, the prosecutor abandoned the count for conspiracy; and the defendants were convicted of publishing the libel. On the taxation of costs, the Master of the Crown office allowed against the defendants the costs of the count for conspiracy and the costs incident thereto.

Under stat. 5 & 6 *W. & M. c. 11. s. 3.*, if a defendant be indicted on two different counts, and remove the indictment by certiorari, and be convicted on one count and acquitted on the other, he is liable only for the costs incident to the first.

Jervis, in this term, obtained a rule to shew cause why the taxation should not be reviewed, arguing that the costs of the count for conspiracy should not have been allowed, because, by stat. 5 & 6 *W. & M. c. 11. s. 3.*, the defendant prosecuting the certiorari was liable only for the costs of the charge on which he was convicted.

Alexander, who shewed cause, admitted that, upon enquiry, he was satisfied that the costs in question ought not to have been allowed to the prosecutor.

The Court (a) made the

Rule absolute.

(a) Lord Denman C. J., Patteson, Williams, and Coleridge Js.

1839.

Saturday,
November 23d.

The QUEEN *against* The Justices of LANCASHIRE.
(In the Matter of the Borough of
MANCHESTER).

Under stat.
13 G. 2. c. 18.
s. 5., notice
to justices of
motion for a
certiorari, sub-
scribed by
A. B., "sol-
icitor for
C. D.," the
party intending
to move, and
in other re-
spects regular,
is sufficient to
authorize the
motion, though
the notice do
not expressly
state that C. D.
is suing forth
the certiorari,
and there be no
affidavit that
the notice is in
fact served at
the instance of
C. D., if the
justices shew
cause and do
not offer affidavits to the contrary.

L. PEEL, in last *Trinity* term, obtained a rule calling on the justices of *Lancashire* to shew cause why a certiorari should not issue to remove into this Court a certain order made by them at the general quarter sessions holden by adjournment at *Salford* in and for the said county on *April* 15th, 1839.

The affidavits in support of the rule stated that the order was made at the above sessions on motion by counsel on behalf of a body claiming to be the town council of *Manchester* under a late charter of incorporation. The order was set out, as follows.

"At the general quarter sessions of the peace held by adjournment," &c. "This Court, in pursuance of the provisions of the acts of the 5 G. 4. c. 85., and of the 5 & 6 W. 4. c. 76. (a), doth empower the visiting justices
of

An order of county justices, authorizing a contract with the council of a borough for the maintenance of borough prisoners in the county house of correction in pursuance of stats. 5 G. 4. c. 85. s. 1. and 5 & 6 W. 4. c. 76. s. 114., is an order made under the former statute, though the town council derive their power of contracting from the latter. And therefore stat. 5 & 6 W. 4. c. 76. s. 132. does not prevent the removal of such order by certiorari.

A borough, though chartered by the Crown under stat. 7 W. 4. & 1 Vict. c. 78. s. 49., and having a grant of quarter sessions, cannot contract with the justices of the next county or division for the maintenance of borough prisoners in their house of correction under stats. 5 G. 4. c. 85. s. 1., and 5 & 6 W. 4. c. 76. s. 114., if the borough has never had a gaol of its own.

(a) Stat. 5 G. 4. c. 85. is, by its title, stated to be an act for amending stat. 4 G. 4. c. 64.

Sect. 1 enacts "That it shall be lawful for the justices of the peace, or any two of them, or for other persons having the government or ordering of any gaol or house of correction, in any city, town, borough, port or liberty, to contract with the justices of the peace, having authority or jurisdiction in and over any gaol or house of correction of the county,
riding

of the house of correction at *Salford*, or any two of them,
of whom the chairman of the said visiting justices shall

1839.

The QUEEN
against
The Justices of
LANCASHIRE.

riding or division, wherein or whereto such city, town, borough, port or liberty is situate or adjacent, or with any two of them, for the support and maintenance, in such last mentioned gaol or house of correction, of any prisoners committed thereto, from such city, town, borough, port or liberty; provided that no such contract be entered into by any justices of the peace of any county, riding or division, without an order for that purpose being made at some general or quarter sessions, or gaol sessions, having jurisdiction in that behalf, nor by the justices or other persons having the government of the prison of any such city, town, borough, port or liberty, without an order for that purpose being made at the sessions thereof; and every such contract may either be perpetual, or limited to a certain term of years, as the parties shall mutually agree; and during the existence of such contract, every prisoner who would otherwise be confined in the gaol or house of correction of the city, town, borough, port or liberty, so contracting, may be lawfully committed or removed to and confined in the gaol or house of correction so receiving him or her under such contract."

Stat. 5 & 6 W. 4. c. 76. s. 114. enacts "That the treasurer of every county in *England* and *Wales* shall keep an account of all costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of all offenders committed for trial to the assizes in such county from any borough in which a separate court of quarter sessions of the peace shall be holden;" and such treasurer shall, not more than twice in every year, send a copy of such account to each town council, and shall make an order on such town council for payment; and the council shall forthwith order the same to be paid to the county treasurer out of the borough fund; and any difference arising upon the account shall be decided by arbitration, as in the case of differences with respect to the payment of monies under contracts made by authority of stat. 5 G. 4. c. 85. (the title of which is recited): "Provided that nothing herein contained shall be construed to alter or restrain the powers given by the last-mentioned act of contracting with the justices of the peace having authority or jurisdiction in and over any gaol or house of correction of the county wherein or where such borough is situated, or whereto it is adjacent, for the conveyance, support, and maintenance in such last-mentioned gaol or house of correction of prisoners committed thereto from such borough, save only that all such powers shall after the 1st day of *May* 1836 be vested in the council of such borough in the name of the body corporate whose council they are, and in none other; and for the purpose of making such contracts as aforesaid the council of such borough, and none other, shall have power to make the orders required by the said last-mentioned act to be made by the justices of the borough at the borough sessions."

1839.
 —
 The QUEEN
 against
 The Justices of
 LANCASHIRE.

be one, to contract with the town council of the borough of *Manchester* for the support and maintenance, in the said house of correction, of any prisoners committed thereto from the said borough on criminal charges, for such term, and under such conditions, as the said visiting justices and council shall mutually agree upon, so as no such prisoner shall be committed to the said house of correction for any term exceeding six calendar months."

The notice of application for a certiorari was as follows.

"To *John Frederick Foster*, Esquire, *Daniel Maude*, Esquire, and *Thomas Potter*, Esquire, three of her Majesty's justices of the peace for the county of *Lancaster*.

"Take notice, that her Majesty's Court of Queen's Bench at *Westminster* will be moved after six days from the time of serving this notice, or as soon after as counsel can be heard, for a writ of certiorari to remove into the said Court all and singular orders made by the keepers of the peace," &c., "at their last quarter sessions," &c., "whereby" &c., (stating the substance of the above-mentioned order). "Dated this 21st day of *May*, 1839.

Yours &c.

Crossley and Sudlow,

Solicitors for Mr. *Richard Gould*, a rate-payer of the township of *Manchester* within and part of the said borough."

The affidavit of service, made by Mr. *Sudlow*, was in these terms. "That he this deponent did, on the 21st day of this instant month of *May*, personally serve *John Frederick Foster*, Esquire, *Daniel Maude*, Esquire, and

and *Thomas Potter*, Esquire, three of her Majesty's justices of the peace for the county of *Lancaster*, and each of them, with a notice of an intended application to her Majesty's Court of Queen's Bench at *Westminster* for a writ of certiorari to remove into the said Court all and singular the orders therein mentioned, made by the keepers of the peace and justices of our Lady the Queen in and for the county of *Lancaster*, of which notice the paper writing hereunto annexed is a true and exact copy." There was no deposition by *Gould*; nor did any of the justices make affidavit for or against the rule.

The affidavits in support of the rule stated that there was not, and never had been, within the knowledge and memory of the deponents, any gaol or house of correction within the borough of *Manchester*; that the *Salford* house of correction was not and never had been treated as a house of correction for the county, but for the hundred of *Salford* only; that it had always been supported by a separate rate upon the hundred, and not at the county expense; and that no commitments had ever been made from parts of the county without the said hundred to the said house of correction, or from *Salford* hundred to any house of correction elsewhere in the county; nor had that hundred contributed to the erection, maintenance, &c., of any house of correction for the county. They also denied that *Salford* was a division within the meaning of stat. 5 G. 4. c. 85. s. 1.

The affidavits in answer stated that a charter (annexed as an exhibit) was granted to the borough of *Manchester* by the Queen in *October* 1838, since which time (*April* 1839) her Majesty had granted to the bo-

1839.

The QUEEN
against
The Justices of
LANCASHIRE.

1839.
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 The QUEEN
 against
 The Justices of
 LANCASHIRE.

rough a separate court of quarter sessions, and appointed a recorder: that sessions had been held by such recorder in and for the borough; that on *June* 13th, 1839, a contract was entered into between the council of the borough and two county justices, who were visiting justices of the *Salford* house of correction, commonly called the *New Bailey*, for the maintenance there of prisoners committed thereto from the said borough; and that since the making of such contract prisoners had been committed to the said house of correction from the borough, both by the borough sessions and by justices acting in and for the borough, and had been maintained in the said house of correction. They also stated that the whole of the borough of *Manchester*, comprised in the charter, was locally situated within the division or hundred of *Salford*.

Sir *J. Campbell*, Attorney General, and *Crompton*, now shewed cause. There is a preliminary objection to this rule, on two grounds. First, the notice given to the justices of the application for a certiorari, is insufficient. Stat. 13 G. 2. c. 18. s. 5. enacts that no certiorari shall be granted to remove any order, “unless it be duly proved upon oath, that the said party or parties suing forth the same, hath or have given six days’ notice thereof in writing to the justice or justices” &c. (a). Here it does not appear “upon oath” that *Gould*, the supposed prosecutor, is the party suing out the writ. There is merely an affidavit that the magistrates were served with a notice, of which the writing annexed is a copy; that notice purporting to be signed by “*Crossley and Sud-*

(a) See the clause set out more fully, p. 161, note (a), post.

low, solicitors for Mr. *Richard Gould*, a rate-payer of the township of *Manchester*." *Rex v. The Justices of Kent* (a), *Rex v. The Justices of Cambridgeshire* (b), and *Rex v. The Justices of Lancashire* (c), shew the strictness with which stat. 13 G. 2. c. 18. s. 5. has been enforced. In the last-mentioned case the party applying for the certiorari, and whose name was omitted in the notice, made an affidavit in support of the rule; yet the writ was refused. It is consistent with every thing disclosed by these affidavits that *Gould* may not have authorised the application, and may disclaim it.

1839.
 The QUEEN
 against
 The Justices of
 LANCASHIRE.

Secondly, by stat. 5 & 6 W. 4. c. 76. s. 132., "no conviction, order, warrant, or other matter made or purporting to be made by virtue of this act shall be quashed for want of form, or be removed by certiorari or otherwise into any of his Majesty's courts of record at *Westminster*." This is an order made under the statute, sect. 114. There is no other legislative authority under which it could be made; for stat. 5 G. 4. c. 85. s. 1. would not authorise a contract with the town council. [*Patteson J.* The subject matter of the contract is within the enactment of stat. 5 G. 4. c. 85., though the persons are not.] The power is given by the subsequent act. Stat. 7 W. 4. & 1 Vict. c. 78. s. 44., which makes any order of the council of a borough for the payment of money out of the borough fund removable by certiorari, does not apply to such orders as this. There being therefore no direct provision to take the case out of the operation of stat. 5 & 6 W. 4. c. 76. s. 132., effect

(a) 3 B. & Ad. 250.

(b) 3 B. & Ad. 887.

(c) 4 B. & Ald. 289. See *Rex v. Abergele*, 5 A. & E. 795.

1839.

—
The QUEEN
against
The Justices of
LANCASHIRE.

must be given to the general words of that clause, as in *Regina v. The Justices of Rippon* (a).

Then, as to the legality of the order itself. The objections taken will be, first, that the magistrates at the *Salford* sessions, and the town council of *Manchester*, had no power to contract for the maintenance of borough prisoners in the *Salford* house of correction, because the borough had no gaol of its own; although this is the very case where such a contract would be most beneficial: and, secondly, that *Salford* is not a "county, riding or division" within the meaning of stat. 5 G. 4. c. 85. s. 1. [*Cresswell*, who supported the rule, said that this point would not be made.] Under stat. 5 & 6 W. 4. c. 76. s. 114., it is not a condition precedent to the making of such a contract as this, that the borough should have a gaol. That section preserves the power of contracting given by sect. 1 of the former statute. By stat. 5 G. 4. c. 85. s. 1. it is made lawful for "the justices of the peace, or any two of them, or for other persons having the government or ordering of any gaol or house of correction" in any borough &c., to contract with the justices having jurisdiction over the gaol or house of correction in the county &c. The borough justices, or any two of them, therefore, may contract, whether there be a gaol or not, and of course the justices having jurisdiction in the county or division may contract with them. If there be actually a gaol in the borough under the government of "other persons" than the justices, those persons ought to be the contractors; in that case, but not in the other, the

(a) 7 A. & E. 417.

existence of a gaol is material. The section does not speak of any borough "where there is a gaol." Where the corporation, under the old system, would have been bound to maintain a gaol if existing, but there was none, the power in question was made inherent in the justices; and, by the new act, 5 & 6 W. 4. c. 76. s. 114., the town council is substituted for them. [*Patteson J.* It seems intended by the former statute that, where a liability to maintain prisoners existed, the justices or others might contract. But where there was no gaol there would be no liability; the prisoners would at all times have been sent to the county gaol.] Where prisoners are committed, and sentenced, there is an implied liability to maintain a gaol; there must be some place to which the prisoners may be sent before trial and after conviction. Borough sessions could not be held without a place of detention, if only a cage; and such a place, whatever it were, would, in law, be a gaol. Here, when sessions were granted, and such grant accepted, the power and obligation to erect a gaol followed; and the exercise of such power is contemplated by stat. 7 W. 4. & 1 Vict. c. 78. s. 40. [*Patteson J.* It will be argued that the borough must have built some gaol of their own before the justices can contract for the maintenance of prisoners in a gaol of the county or division.] That would be a very inconvenient construction of the act. Could it be said that, if the borough gaol were burnt, the power would cease? By sect. 4 of stat. 5 G. 4. c. 85., if the borough justices think fit, "instead of altering or building any gaol or house of correction for their separate use, or contracting under the provisions aforesaid," to raise money in aid of building anew or enlarging a county prison, they may agree for that purpose

1839.

—
The QUEEN
against
The Justices of
LANCASHIRE.

1839.
 ———
 The QUEEN
 against
 The Justices of
 LANCASHIRE.

with the justices having authority or jurisdiction over any gaol or house of correction of the county or division. Here, therefore, the previous existence of a gaol in the borough is not considered indispensable. Stat. 6 & 7 W. 4. c. 105., "for the better administration of justice in certain boroughs," enlarges, by sect. 2, the powers given to the councils of boroughs by stat. 5 & 6 W. 4. c. 76. s. 114.; and, in so doing, the legislature does not seem, by the language used, to recognise any such limitation as that now insisted upon.

Cresswell, Wightman, and L. Peel, contra. As to the preliminary points, the object of a notice under stat. 13 G. 2. c. 18. s. 5. is, that the justice may have an opportunity of shewing cause. The information which enables him to do so is contained, not in the affidavit of service, but in the notice: on seeing that he determines whether or not it is necessary for him to appear. The act does not require that the party prosecuting the certiorari should himself sign the notice. It is sufficient if the document shews who is the party about to move; and the justice thereupon appears, to contest the right of such party. If it turns out that the person mentioned is not the person who moves, the justice may take that objection on shewing cause, as was done in *Rex v. The Justices of Cambridgeshire (a)*. It is, indeed, to be "duly proved upon oath" that notice has been given to the justice; but the justice has no right to information on oath; he must look to the "notice" "in writing." Here the notice shewed sufficiently who intended to sue out the writ; and the jus-

(a) 3 B. & Ad. 887.

tices appear. [*Patteson J.* The oath is for the information of the Court, not the justice. But you do not shew to the Court, on oath, who is prosecuting the certiorari.] The information to the Court is required in order that the certiorari may not issue unless the justices have had an opportunity of shewing cause. Here they shew cause. [*Patteson J.* That argument was used without success in *Rex v. The Justices of Lancashire*(a)]. The notice there named no prosecutor. It is said that *Gould* may disclaim this notice; but that may happen in any case; thus, in *Rex v. The Justices of Kent* (b), parties who appeared to have given due notice declared that they abandoned it. In *Rex v. The Justices of Cambridgeshire* (c) the notice itself did not give the proper information correctly. [*Patteson J.* You need not trouble yourself further on this point. The justices might have shewn, as cause for not granting a certiorari, that *Gould* was not the party really applying; and, if they had proved that, the writ could not have gone. As it is, notice sufficiently appears.] Then, further, this order was not made under stat. 5 & 6 *W. 4. c. 76.*, and consequently the certiorari is not taken away. If stat. 5 *G. 4. c. 85.* were repealed, there would clearly remain no power in the town council to enter into this contract. And the justices of *Lancashire*, who make the order for contracting with the town council, derive no power from stat. 5 & 6 *W. 4. c. 76.* An order by the town council for paying money in fulfilment of this contract would have been removeable by certiorari, under the express enactment of stat. 7 *W. 4.* and 1 *Vict. c. 78. s. 44.*

Then as to the merits of this order. It is argued, on

1839.

The QUEEN
against
The Justices of
LANCASHIRE.

(a) 4 *B. & Ald.* 289.(b) 3 *B. & Ad.* 250.(c) 3 *B. & Ad.* 887.

the

1839.

The QUEEN
against
The Justices of
LANCASHIRE.

the other side, that the mere grant of a quarter session to *Manchester* gave the power of erecting a gaol there. That is not so. The Queen might make a grant of quarter sessions independently of stat. 5 & 6 *W.* 4. c. 76.; but a new gaol cannot be erected without an act of parliament: 2 *Inst.* 705.; *Com. Dig. Imprisonment*, (A.); 4 *Bac. Abr.* 28., *Gaol and Gaoler*, (A.) (a): the ancient policy of the law having been to restrain the granting of prisons, and to keep them as much as possible in the hands of the sheriffs, as appears by 1 stat. 14 *Ed.* 3. c. 10., stats. 13 *R.* 2. c. 15., 19 *H.* 7. c. 10., *Mitton's Case* (b), *Lord Sanchar's Case* (c). It is contended that, because a gaol is necessary where sessions are to be held, therefore the right to have a gaol follows where sessions are granted; but the true proposition is that, if there be no gaol, it follows that no sessions can be granted. The opinion of the legislature on this subject is shewn by sect. 103 of stat. 5 & 6 *W.* 4. c. 76., which requires a borough petitioning for a grant of sessions to set forth the state of the gaol. In the case which was put, of a gaol having been burnt down, the borough, on petitioning, would state that fact; but, where a borough had once had a gaol, there would be power to enforce the repairing or rebuilding, whereas, if a gaol has never existed, there is no power to compel the building of one. In the case supposed, if the statement returned were that the gaol was in ruins, the answer probably would be that a quarter session would be granted when it was rebuilt. By the proposed contract prisoners are to be kept in the *Salford* gaol for a term not exceeding six calendar months: *Manchester*

(a) 7th ed.

(b) 4 *Rep.* 32 b. See 34 a.(c) 9 *Rep.* 117 a. See 119 b.

itself

itself has no gaol : then, if the recorder sentences to an imprisonment of more than six months, the judgment cannot be executed. At least, therefore, this order is bad ; and, if no other could be made, there could not be a good grant of quarter sessions, because the necessary terms of such a grant could not be fulfilled. (*The Attorney General* here referred to sect. 3 of stat. 5 G. 4. c. 85., as shewing that the contract need not include every class of prisoners.) There is no place of confinement for any who may be excepted ; for the borough has no gaol, and the contract can be made only with the county or division within or adjacent to which the borough is ; and *Manchester* is wholly within *Salford* hundred. The case then is, in principle, like that of the town of *Sunderland*, where there was no town clerk or other person capable of the functions prescribed by stat. 5 & 6 W. 4. c. 76. ss. 15, 16., and, therefore, although “ The mayor, aldermen, and commonalty of the borough of *Sunderland*,” were mentioned in schedule (A) of the statute, yet the borough could not have a mayor or aldermen (a) till an act was passed, which removed the difficulty. By stat. 5 G. 4. c. 85. s. 1. the parties enabled to contract with the county or division justices are “ the justices of the peace ” or “ other persons having the government or ordering of any gaol or house of correction, in any city, town, borough,” &c. The town council cannot represent these, in a borough not having a gaol. The same section enacts that, while such contract continues, “ every prisoner who would otherwise be confined in the gaol or house of correction of the city, town, borough,” &c., “ so contracting ” may

1839.

—
The QUEEN
against
The Justices of
LANCASHIRE.

(a) See *Rex v. White*, 5 A. & E. 613.

be

1839.

The QUEEN
against
The Justices of
LANCASHIRE.

be lawfully committed or removed to the gaol &c. receiving him under such contract. But, where no borough gaol exists, there can be no prisoners answering this description.

The argument in support of this order tends to shew that a tax for the building of gaols, which could not be imposed directly without an act of parliament, may be so imposed indirectly, by the grant of a quarter session. That the law has not contemplated any such power may be inferred from the provisions as to rebuilding gaols and houses of correction in stat. 4 G. 4. c. 64., where the provisions for that purpose are not made applicable to cities and towns generally, but limited, by sect. 2, to a few, named in schedule (A) (a), of which *Manchester* is not one. Stat. 7 W. 4., and 1 Vict. c. 78. s. 37., extends those provisions to the boroughs named in the schedules of stat. 5 & 6 W. 4. c. 76.; but *Manchester* is not among these. Stat. 7 W. 4. & 1 Vict. c. 78. s. 49. enacts that the Crown, on petition for a charter, may, by such charter, extend to the town or borough "all the powers and provisions of the said act for regulating corporations," 5 & 6 W. 4. c. 76.; but this does not include the provisions of stat. 7 W. 4. & 1 Vict. c. 78. s. 37.

The present order, therefore, was made without jurisdiction; and, if so, the certiorari lies for this, as well as for the reasons before stated.

PATTESON J. We have already disposed of the first question, as to notice; and we are of opinion that the subject matter of this order comes within stat. 5 G. 4. c. 85. s. 1., though one of the parties contracting is

(a) See *Thompson v. Raikes*, 1 A. & E. 863.

introduced by stat. 5 & 6 W. 4. c. 76.; and therefore that the certiorari is not excluded by sect. 192 of the latter act. Then as to the order itself. I cannot tell what consequences may result from the construction which we must put upon the statutes: but, if mischievous, they must be remedied by the legislature. I cannot believe that stat. 5 G. 4. c. 85. was passed with the design of authorising any contracts of the kind in question, except where there was already a liability to maintain prisoners, and a gaol existing. I think that it was intended to enable parties who had a gaol, and were liable to the maintenance of prisoners, to send them, under contract, to a gaol in which they might be maintained by others. This agrees with the language of sect. 2, where it is said that the monies to be paid under such contract shall be raised in the same manner as monies for defraying the expences "of the gaol or house of correction for which a substitute shall be provided under such contract." The effect of the enactments is, that those who have a gaol and prisoners may contract with the county or division to take the whole or a part of the prisoners off their hands. Whether, at the time when stat. 5 G. 4. c. 85. passed, there were any instances of quarter sessions without a gaol, I do not know; but I can hardly conceive that such a case existed, or was contemplated. Where there were no sessions, but the magistrates committed, they would commit at once to the county gaol; and in those cases there could be no subject matter of contract with the county, the town from which the commitment took place having no gaol. I should think that, under stat. 5 G. 4. c. 85., there was no borough having quarter sessions and not a gaol; but
this

1839.

The QUEEN
 against
 The Justices of
 LANCASHIRE.

1839.

—
The QUEEN
against
The Justices of
LANCASHIRE,

this state of things arises now because a grant of sessions has been made to a new corporation having no gaol. We cannot, however, strain the act, to adapt it to a state of circumstances not contemplated in framing it. It appears to me that the plain words refer only to the case in which a gaol was existing, and the parties having the government of it contracted with others who had also a gaol, to transfer prisoners to that gaol. I see the absurdity there would be in saying that parties must build a gaol in order to have the right of contracting to send their prisoners elsewhere; but, on the construction of the acts of parliament, I cannot say that this is a right order. The rule for a certiorari must therefore be absolute.

WILLIAMS J. I must say one word on a point upon which this rule entirely depends. The contract must have been made under stat. 5 G. 4. c. 85., because the justices for the county or division have no power to make the contract but under that act. There must be capable parties on both sides. The town council, which did not exist when that statute passed, is introduced by stat. 5 & 6 W. 4. c. 76., as a party to a contract on the terms of the previous act. The order, then, being an order under stat. 5 G. 4. c. 85., I concur in what has been said on the remainder of the case. Whether the want of any authority in the act for making such an order has arisen from inadvertence, or from what other cause, I cannot say: it is to be lamented; but we cannot strain the existing law: and the rule must therefore be absolute.

Lord

Lord DENMAN C. J. (a). As far as I have been able to follow the argument, I agree in what has been said.

Rule absolute for a certiorari (b).

(a) Lord Denman C. J. had gone to attend the Privy Council when the case was called on, and returned shortly before the end of the Attorney General's argument. Coleridge J. was in the Bail court: Littledale J. sitting at nisi prius.

(b) The order was brought up, and a rule nisi obtained for quashing it. The case was set down in the crown paper, and has since stood over to await the ultimate decision, in *Rutter v. Chapman* (now depending in the Exchequer Chamber), on the validity of the *Manchester* charter.

As to certiorari, see the next case.

1839.

The QUEEN
against
The Justices of
LANCASHIRE.

The following case was decided in *Michaelmas* term,
1840.

The QUEEN against How and Others.

[Monday,
November 16th,
1840.]

SIR W. W. FOLLETT had obtained a rule, in last Trinity term, calling upon William Wybergh How and Thomas Girdler Gwyn, Esquires, two justices for the borough of Shrewsbury, and upon Henry Diggory Warter, Esquire, and the Reverend Charles Leicester, two justices for the county of Salop, to shew cause why a certiorari should not issue to remove into this Court a certain order or warrant of appointment, under their hands and seals, bearing date on or about the 7th day of April last, whereby Samuel Probert and three others (named in the rule) were appointed to be overseers of the poor of the parish of St. Julian, in the said borough and county.

Under stat.
13 G. 2. c. 18.
s. 5., notice to justices of an application for a certiorari to bring up their order, should state that the notice is given by the party suing forth the certiorari, and should specify the party. And upon such application, the party suing forth the writ should be identified on affidavit with the prosecutor named in the notice; and the

justices therein named with those on whom notice has been served. It is not enough that the party giving the notice is the only person making affidavit in support of the rule on the merits; or that, from such affidavit, it appears that an order was made by justices of the same name as those to whom the notice is given, and was of the same date and to the same effect as that described in the notice and the rule nisi. So held, on cause shewn against such rule.

The objection to the notice is not cured by the rule nisi being enlarged by consent.

An

[1840.]

—
The QUEEN
against
How.

An affidavit was made that notice of this application had been served upon four justices (naming them, as in the rule). The notice, deposed to by an attorney, was as follows.

“To *William Wybergh How*, Esq.” &c. (naming the four, with their offices, as in the rule).

“Take notice, that an application will be made to Her Majesty’s Court of Queen’s Bench, at *Westminster*, on *Wednesday*, the 27th day of *May* instant, that a writ of certiorari may issue to remove into the said Court all and singular orders or warrants of appointment of *Samuel Probert*” &c. (naming the parties, as in the rule), “being householders in that part of the parish of *St. Julian* which is within the said borough, to be overseers of the poor of the parish of *St. Julian*. Witness my hand, this 7th day of *May* 1840.”

“*Edward Leake*,

“Assistant overseer.”

The only other affidavit in support of the rule was made by *Leake*, who stated that he was the assistant overseer, and that an appointment was signed “by *William Wybergh How*, Esq., and *Thomas Girdler Gwyn*, Esq., two of her Majesty’s justices of the peace for the borough of *Shrewsbury*, and by *Henry Diggery Warter*, Esq., and the Reverend *Charles Leicester*, clerk, two of her Majesty’s justices of the peace for the said county;” and he set out, in his affidavit, the said appointment, which purported to be made by justices so named, and to appoint *Samuel Probert*, and other three parties, named as in the rule, overseers of the parish of *St. Julian*, and to be dated 7th *April* 1840.

The present rule was, in *Trinity* term, enlarged by consent, to this term.

Sir

Sir *J. Campbell*, Attorney General, and *W. Yardley* now shewed cause. The notice is insufficient under stat. 13 G. 2. c. 18. s. 5. (a). The object of that enactment was to enable the justices, if they should think fit, to shew cause in the first instance: this notice would not enable them to do so. It does not state who is to make the application, nor the day when, or place where, the order was made, nor by whom it was made. Some of these particulars may be collected from the rule nisi; but that does not aid the defect in the notice, because it cannot enable the justices to shew cause in the first instance. There is nothing to shew that the notice is given by "the party or parties suing forth" the certiorari. *Regina v. Hedges* (b) shews that such a defect is fatal under the Rule of Court, *Mich.*, 3 *Vict.* (c): and *Rex v. The Justices of Lancashire* (d) decides the point expressly on stat. 13 G. 3. c. 18. s. 5. In *Rex v. The Justices of Cambridgeshire* (e), under the same section, a notice, purporting to be signed by one churchwarden only, of a motion for a certiorari to be made "on behalf of the churchwardens and overseers of the poor of the said parish" was held bad.

[1840.]

The QUEEN
against
How.

(a) Which enacts that "no writ of certiorari shall be granted, issued forth or allowed, to remove any conviction, judgment, order or other proceedings had or made by or before any justice or justices of the peace of any county, city, borough, town corporate or liberty, or the respective general or quarter sessions thereof," "unless it be duly proved upon oath, that the said party or parties suing forth the same, hath or have given six days notice thereof in writing to the justice or justices, or to two of them, (if so many there be) by and before whom such conviction, judgment, order or other proceedings shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari."

(b) Page 163, post. The case was decided immediately before *The Queen* against *How*, on the same day.

(c) *Antè*, p. 2. (d) 4 *B. & Ald.* 289. (e) 3 *B. & Ad.* 887.

[1840.]

THE QUEEN
against
How.

Sir *W. W. Follett* and *Whateley*, contra. In *Rex v. The Justices of Lancashire* (a) the signature was by the attorneys only; the party on whose behalf the application was made was not mentioned at all. Here the assistant overseer signs the notice; and he is the only party making affidavit in support of the rule on its merits: there is, therefore, no doubt that he is the person applying. The act does not require that the notice should state who applies (as the rule of *Mich. 3 Vict.* does), but only that it shall be proved that the party suing out the certiorari has given notice. [*Coleridge J.* In *Rex v. The Justices of Lancashire* (a) the Court thought that the notice should point out the party applying for the writ, because the justices might shew cause in the first instance on the ground of such party having no right to apply.] In *Rex v. The Justices of Cambridgeshire* (b) the Court seems to have considered that the application must necessarily be deemed to have been given on behalf of the party only who signs the notice. That the order here was signed by the justices, and the date and whole tenor of the order appear from the affidavit of the overseer; it is not necessary that these should appear in the affidavit of service. [*Lord Denman C. J.* The justices making the order mentioned in *Leake's* affidavit are not identified with those to whom the notice is addressed, nor is the order identified, except by the coincidence of names.] That is sufficient: the Court will infer the identity as a jury would. This notice effectually answers the end which the statute had in view. Further, the objection to the notice comes too late after the parties have consented to enlarge the rule.

(a) 4 B. & Ald. 289. See *Rex v. Abergyle*, 5 A. & E. 795.

(b) 3 B. & Ad. 887.

LORD DENMAN C. J. The statute requires that it shall be duly proved on oath that the party suing forth the certiorari has given the notice. I cannot collect that the overseer who has signed this notice is the party who is to sue forth the certiorari. Nor do I find that the justices upon whom the notice is served are the justices who made the order. It is no answer that the end which the statute had in view will be attained: the objection made is, that the enactment of the statute is not complied with. I disclaim looking to any thing but what the statute requires. I think it is too much to contend that the enlargement of the rule cures the objection; such a point was, I believe, never made before.

[1840.]

The QUEEN
against
How.

LITLEDALE, WILLIAMS, and COLERIDGE Js. concurred.

Rule discharged.

The following is the case referred to in *Regina v. How*, p. 161. antè.

The QUEEN against HEDGES.

[Monday,
November 16th,
1840.]

SIR J. CAMPBELL, Attorney General, in *Easter* term, 1840, obtained a rule nisi for a quo warranto information against the defendant for exercising the office of town councillor of the borough of *Wallingford*.

Under R. Mich. 3 Vict., the affidavit in support of a motion for a quo warranto information must state at whose instance the application is made. It is not enough for a party to depose that, if the

The rule was obtained upon the affidavit, among others, of *Thomas Holmes*, who deposed that he was a Court grant the information, it is his intention to become really and bonâ

fide the relator.]

[1840.]

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The QUEEN
against
HEDGES.

burgess of the borough, and that, in case the Court should order the information to be exhibited, it was his intention to be and to become really and bonâ fide the relator therein.

Sir *W. W. Follett* (with whom was *W. J. Alexander*) objected that the affidavit did not satisfy the requisitions of *Reg. Gen. Mich. 3 Vict. (a)*, inasmuch as it did not state that the motion was made at *Holmes's* instance.

Sir *J. Campbell*, Attorney General, and *Talfourd* Serjt., contrâ. The object of the rule was that it might be known who was the relator. That is satisfied here; and it is unnecessary to shew, in addition, that the application is made at the instance of the party who is to be the relator. And the application itself, coupled with the affidavit of intention, shews at whose instance the motion is made. The consequences as to costs, which the Court intended to secure, are secured here.

Lord DENMAN C. J. The objection must prevail. Every party who makes an affidavit in support of the quo warranto might be said to be liable to costs: but we intended, by the rule, to get rid of the questions which arose in these cases; and we therefore required an affidavit to shew, not merely who the relator is, but at whose instance the application is made. We ought not to have granted this rule without such an affidavit.

(a) *Antè*, p. 2.

LITLEDALE J. Suppose this rule were to be made absolute, and the deponent were to change his intention and refuse to proceed, how could he be the relator ?

[1840.]

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The QUEEN
against
HEDGES.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

GROWCOCK and Others *against* WALLER.

Saturday,
November 23d.

BALL moved that the officer might be directed to issue a writ of *capias* against the defendant, without a Judge's order having been obtained, or a writ of summons taken out. The defendant, being in custody, and having petitioned the Court for the relief of Insolvent Debtors, was, on *Thursday* last, by that Court, adjudged to be discharged and entitled to the benefit of the act, after confinement for seven months from the vesting order (26th *August* 1839). The affidavits stated that he was now in custody at the suit of a friendly creditor, and that there was a probability that the object of the other creditors would be defeated, and the defendant be discharged. The officer had been applied to, on the usual affidavit to hold to bail, to issue a writ of *capias* against the defendant, but had refused to do so without the order of the Court; and, on application being made to *Littledale J.*, he referred the matter to the full Court.

A writ of *capias* may issue, without a judge's order or a writ of summons, against a prisoner remanded by the Insolvent Debtors' Court, under 1 & 2 *Vict. c. 110.*
s. 85.

Ball contended that it was not necessary, in the case of a remanded insolvent, that any order of a Judge should be obtained, or writ of summons previously issued, under stat. 1 & 2 *Vict. c. 110.* sects. 1, 2, 3; it

1839.
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 GROWCOCK
against
 WALLER.

being provided, by sect. 85, "That in all cases where it shall have been adjudged that any such prisoner shall be so discharged, and so entitled as aforesaid, at some future period, such prisoner shall be subject and liable to be detained in prison, and *to be arrested and charged in custody* at the suit of any one or more of his or her creditors with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, in the same manner *as he would have been subject and liable thereto if this act had not passed.*" This case may therefore be considered as an exception to the first and second sections. [Lord Denman C. J. referred to *Turnor v. Darnell (a)*]. There it was decided that sects. 1 and 2 of the act do not apply to a case like the present, but that a remanded insolvent is left to the provision of the old law under stat. 7 G. 4. c. 57. s. 55.; and Parke B. observed that the Judge's order could not be obtained, because it could not be sworn that the defendant was about to quit the country. Sect. 85 of stat. 1 & 2 Vict. c. 110. recognises the exception in sect. 55 of stat. 7 G. 4. c. 57., and re-enacts the provision there made.

Per Curiam (b). We think the rule should be granted. The case of *Turnor v. Darnell (a)* is expressly in point.

Rule accordingly, absolute in the first instance.

(a) 5 M. & W. 28.

(b) Lord Denman C. J., Patteson, Williams, and Coleridge Js.

1839.

The SOUTH EASTERN Railway Company *against* Monday,
SPROT. November 25th.

A DECLARATION being delivered in this action, the defendant took out a summons, pursuant to *Reg. Gen. Trin. 1 W. 4. (a)*, to shew cause why he should not be at liberty to plead several matters. On the summons, *Littledale J.* ordered that some of the proposed pleas should be consolidated: and accordingly the defendant pleaded, to the first count: 1. That the call was not duly made upon all the subscribers and shareholders by competent persons, and for the sole purpose of the undertaking (*b*): 2. That due notice was not given of the call. To the second count, two similar pleas. To the last count, *nunquam indebitatus*. In this term a rule was obtained, calling on the defendant to shew cause why the first plea to each of the first two counts should not be struck out. The affidavit on which the rule was obtained did not state the pleadings now on the record, farther than as they are mentioned above.

In future, when a motion is made for the purpose of setting aside pleas pleaded by a judge's order or rule of Court for pleading several matters, the motion must be to rescind the order or rule, not to strike out the pleas.

On motion to set aside pleas, it appeared by affidavit that they were pleaded to the first and second counts of a declaration at the suit of a railway company, and were: to the first count, 1. That the call was not duly made upon all the subscribers and shareholders by competent persons, and for the sole purpose of the undertaking: 2. That due notice was not given of the call. To the second count the like pleas. Nothing further appeared as to the declaration. Held, that the declaration ought to have been set out, and that the Court could not, on this statement, entertain the motion.

Channell now shewed cause, and contended that the motion ought to have been for rescinding the learned Judge's order, and that the present motion could not be

undertaking: 2. That due notice was not given of the call. To the second count the like pleas. Nothing further appeared as to the declaration. Held, that the declaration ought to have been set out, and that the Court could not, on this statement, entertain the motion.

(a) *2 B. & Ad. 789.*

(b) The defendant had moved for leave to plead, as separate pleas, to the first count, 1. that the call was not made on all the subscribers and shareholders: 2. that it was not duly made by competent persons, and for the sole purpose of the undertaking; and the same two pleas to the second count. And to each count a third plea of the want of notice.

M 4

entertained;

1839.
 ———
 The SOUTH
 EASTERN
 Railway
 Company
 against
 SHROX.

entertained; and he cited *Wright v. Elliot* (a) and *Rex v. The Commissioners of the Thames and Isis Navigation* (b).

Sir *W. W. Follett*, (with whom was *W. J. Alexander*), *contra*. This application is, in substance, to rescind the order: and, if the rule is not accurately drawn up, the Court will mould it. [*Patteson J.* We do not assist parties who have not drawn up their rules in proper form.] The Court has clearly jurisdiction to set aside pleas improperly pleaded, and will look at the substantial merits of the application. [*Coleridge J.* The practice at chambers has been to move to set aside pleas, although pleaded by a judge's order.] No one is prejudiced by entertaining the application in this form. [*Lord Denman C.J.* We believe that this objection has not usually been taken, and that the practice has been to move to set aside pleas pleaded by order or rule of Court, without moving to set aside the order or rule for pleading several matters; and, therefore, we will hear the discussion of this rule. We wish it to be understood that we decide so, because we do not find that the application has not ordinarily been made in this manner; but it is important that a judicial determination should not be set aside by any but the regular course of proceeding: and, for the future, if a rule of court or order of a judge is to be interfered with, the motion must be to discharge that former rule or order.]

Channell then objected that the affidavit in support of the rule did not set out the declaration, and therefore

(a) 5 A. & E. 818.

(b) 5 A. & E. 804.

the Court could not judge whether the pleas ought to be set aside or not; and he cited *Roy v. Bristowe* (a).

1839.

THE SOUTH-
EASTERN
RAILWAY
COMPANY
against
STROT.

Sir *W. W. Follett*, contra. The affidavit shews sufficiently for what the action is brought. [*Patteson* J. The application is to strike out the first plea to the first count, and the first plea to the second count. How can we decide on this without knowing what the counts are?]

Sir *W. W. Follett* admitted that this objection was fatal.

Per Curiam (b),

Rule discharged.

(a) 2 M. & W. 241.

(b) Lord Denman C. J., *Patteson, Williams, and Coleridge* Js.

END OF MICHAELMAS TERM.

1839.

MICHAELMAS VACATION (*a*).The QUEEN *against* The Inhabitants of St.
LAWRENCE, LUDLOW (*b*).

The recorder of a borough, which has a grant of separate quarter sessions under stat. 5 & 6 W. 4. c. 76., has jurisdiction to try an appeal against an order of the borough justices to pay the expense of removing a pauper lunatic to an asylum, under stat. 9 G. 4. c. 40. s. 38.

ON appeal against an order of two justices of the borough of *Ludlow* (under stat. 9 G. 4. c. 40. s. 38.), requiring the overseers of the parish of *St. Owen*, in the city of *Hereford*, to pay to the overseers of the parish of *St. Lawrence, Ludlow*, the expense of conveying to an asylum a pauper lunatic, chargeable to the latter and settled in the former parish, the order was quashed, subject to the opinion of this Court on the question whether the court of quarter sessions for the borough of *Ludlow* had jurisdiction to hear the appeal.

By letters patent, dated 3d June, 6 W. 4., made on petition of the council of the said borough (under 5 & 6 W. 4. c. 76. s. 103.), the King granted to the borough "that a separate court of quarter sessions of the peace shall henceforward continue to be holden in and for the said borough, according to the provisions of the said act," and thereby assigned the recorder for the time being to be the king's justice to inquire the truth, by the oath of good and lawful men of the borough, of all felonies, misdemeanours, crimes, and

(*a*) The Court sat in banc, under stat. 1 & 2 Vict. c. 32., from the 26th to the 30th of November inclusive. The following cases in B. R. were decided during that period.

(*b*) This case, argued in last *Easter* term, is reported by Mr. *Adolphus* and Mr. *Smirke*. The subsequent cases decided in B. R. during *Michaelmas* vacation, and marked S, are reported by Mr. *Smirke*.

offences

offences within the borough, of which justices of the peace may lawfully inquire, &c., (in the usual form of a commission of the peace, but without particularising the offences;) and “to hear and determine all and singular the felonies, misdemeanours and offences aforesaid, and all and singular other the premises according to the laws and statutes of *England*, as in the like case it has been accustomed or ought to be done before and by our courts of quarter session in *England*.”

1839.

—
The QUEEN
against
The Inhabit-
ants of
St. LAWRENCE,
LUDLOW.

Greaves and *Skinner*, in support of the order of sessions (a). The recorder had jurisdiction to hear the appeal. It is true that his commission, as contained in the letters patent, specifies only criminal matters, but it is in the usual form of all commissions, except that there is not the long enumeration of offences contained in the form of commission settled in 33 *Eliz.* (b). The jurisdiction of justices is to be collected, not from the commission or charter, but from the statutes which have from time to time assigned to them a power in appeals and civil proceedings. It would have been enough if the king had granted a court of quarter sessions simply; the rest is a necessary consequence. It is analogous to the grant of a new county commission, where there was one in existence before. Stat. 9 G. 4. c. 40. (ss. 54, 60.) gives parties aggrieved an appeal to the justices of the peace at the general or quarter sessions of the peace to be held in and for the county in which the order shall be made; and the interpretation clause, sect. 61, provides that “county” shall be deemed to

(a) April 27th 1839. Before Lord Denman C. J., *Littledale, Patteson, and Coleridge* Js.

(b) 3 *Hawk. P. C.* 57, book 2, ch. 8. sects. 9–13. 7th (*Leach's* ed.). *Lambard's Eirenarcha*, Book 1. cap. 8.

include

1839.

The QUEEN
against
The Inhabit-
ants of
St. LAWRENCE,
LUDLOW.

include a "town corporate;" it is therefore obligatory to appeal to the town sessions. If this was so before the Municipal Corporation Act, it is, à fortiori, true now; for sect. 105 of that act provides that the recorder shall sit as the sole judge, and the Court shall have cognisance of all "matters whatsoever, cognizable by any court of quarter sessions of the peace for counties in *England*, and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being sole judge, as fully as any such last-mentioned court," with the express exception of making county rates, or rates of that nature, granting alehouse licences, and other powers specially vested in the town council. The exception proves that all other civil jurisdiction was intended to pass. The act having invested the recorder with the full powers of an ordinary court of quarter sessions, it was not competent to the crown to limit those powers. After nominating the recorder, the authority of the crown ceases, and all the rights and jurisdiction of the recorder are then derived from the statute; just as the appointment of clerk of the peace by the *custos rotulorum* is held to give him the office *quam diu se bene gesserit*, notwithstanding any restriction which the *custos* may attempt to introduce into the appointment; *Harcourt v. Fox* (a). In *Regina v. The Recorder of Hull* (b) it was held that a recorder, appointed under the same act, has the powers of a county quarter session with regard to the inspectors of weights and measures.

Smithies, contra. The general intent of stat. 5 & 6 W. 4. c. 76. was only to transfer to the recorder the powers

(a) 1 *Show.* 506. See p. 535.

(b) 8 *A. & E.* 638.

formerly

formerly exercised in criminal matters by the borough quarter sessions. In all appeals in settlement cases the policy of the legislature has been to withdraw them from local jurisdictions, and give them to the county justices (a); and the interpretation clause in 9 G. 4. c. 40. cannot be so construed as to infringe this general policy. It is to be construed distributively, and according to the subject matter treated of in each provision of the act in which the county is named. That stat. 5 & 6 W. 4. c. 76. contemplates only criminal jurisdiction, is apparent from sects. 107 and 111 of that act. Sect. 111 saves the county jurisdiction except in those boroughs where there was a non intromittant charter, or exemption, already in existence; so that there is no pretence for saying that it is necessary to resort to the borough sessions. Sect. 31 of 7 W. 4. & 1 Vict. c. 78., in giving to the borough justices all the powers of county justices under local acts, evidently supposes that the county jurisdiction under general acts continues undisturbed. The act in operation before stat. 9 G. 4. c. 40. was 5 G. 4. c. 71., on which *Rex v. Maulden* (b) was decided. That act also contained a construction clause, sect. 6, not indeed exactly in the same terms, but one which was also insufficient to deprive the county of its exclusive jurisdiction. To do this, express negative words should be used; the affirmative language alone is not enough. The argument of *Stephen Serjt.* in *Paget v. Foley* (c) collects many cases bearing on this point. In *Regina v. The Recorder of Hull* (d) the borough was a county of itself.

Cur. adv. vult.

(a) Stat. 8 & 9 W. 3. c. 30. s. 6. See 2 *Nol. P. L.* 493, 494. 4th ed.

(b) 8 B. & C. 78. (c) 2 *New Ca.* 679. (d) 8 A. & E. 638.

Lord

1839.

The QUEEN
against
The Inhabit-
ants of
St. LAWRENCE,
LUDLOW.

1839.

—
The QUEEN
against
The Inhabit-
ants of
St. LAWRENCE,
LUDLOW.

Lord DENMAN C. J. now delivered the judgment of the Court.

The question here is, whether the recorder of *Ludlow* had power to try an appeal against an order made by two justices of the borough under the statute 9 G. 4. c. 40. s. 38. The appeal is given by the forty-sixth section of that act, and is to the quarter sessions to be holden in the *county* where the matter of appeal shall have arisen. The sixty-first section of the act provides that the word "county" shall be deemed to include any town corporate. Now the matter of appeal here was the order made by two justices in the borough of *Ludlow*; therefore, reading the word "county" as "town corporate," it seems that the appeal is given to the borough sessions. But, whether this would or would not have been the case if the old corporation had continued, we have no doubt that it is so as the law now stands.

The powers of the recorder as a court of quarter sessions are enacted by the 105th section of stat. 5 & 6 W. 4. c. 76., and give him cognizance of all "matters whatsoever cognizable by any court of quarter sessions of the peace for counties in *England*;" among which unquestionably the present matter is one. The recent grant of his late Majesty cannot make any difference, for it does not limit or confine the operation of the statute 5 & 6 W. 4. c. 76.; indeed all the words in that grant relating to the duties of the recorder seem to be mere surplusage. The order of sessions must be confirmed.

Order of sessions confirmed.

1839.

JONES against WILLIAMS.

BUSBY obtained a rule in last *Easter* term, calling upon the defendant to shew cause why the writ of *fi*er*i* facias issued in this action should not be set aside for irregularity, with costs.

It appeared that, after notice of trial had been given, the cause, and all matters in dispute therein, were, by articles of agreement, referred to a barrister. The arbitrator awarded that a verdict should be entered for the defendant; and, further, that 69*l*. 8*s*. 11*d*. were due from plaintiff to defendant, which he directed to be paid by plaintiff to defendant, with the costs, which had been ordered to abide the event of the award. No judgment was entered up; but, after the award was made, the agreement of reference was made a rule of Court of 8th *March* 1839: the costs were taxed afterwards: and then the *fi. fa.* issued for the 69*l*. 8*s*. 11*d*. and costs, amounting, in all, to 308*l*. 8*s*. 11*d*., which the *fi. fa.* and warrant recited to have been ordered by the rule of 8th *March*, 1839, to be paid by the plaintiff to the defendant.

Under an agreement of reference a sum was awarded to be paid by plaintiff to defendant; and afterwards the agreement was made a rule of Court.

Held that the plaintiff could not, by virtue of the rule of Court, issue execution for the sum, under stat. 1 & 2 *Vict.* c. 110. s. 18., that clause being applicable, for such purpose, only where the money payable by the rule is expressed in the rule itself.

In *Trinity* term last (a) *R. V. Richards* and *Wightman* shewed cause against the rule, and *Busby* was heard in support of it.

Cur. adv. vult.

(a) *June* 12th, 1839. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js.

Lord

1899.

JONES
against
WILLIAMS.

Lord DENMAN C. J., in this vacation (*November 30th*), delivered the judgment of the Court.

The question depends on the construction of the stat. 1 & 2 *Vict. c. 110. s. 18.*, by which all decrees of courts of equity, and all rules of courts of common law (amongst other orders), “whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors;” and then, after alluding to proceedings in other courts, it says, that “all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.”

The rule, on which it is contended execution may be issued, embodies the submission to arbitration, whatever it may be: and it may be such, as that nothing can be taken into consideration but the claim of a debt from one party to the other; or it may be a question of mutual accounts; or it may be of money payable in connection with other matters, or out of which money, not originally contemplated, may nevertheless become payable; or it may be of matters in respect of which no monies can ever become payable; or it may be of all matters in difference, under which money may or may not be payable,

In no one instance of submission to arbitration is any money whatever to be payable by the rule; and then the question is whether, if money be awarded to be paid, it becomes payable by the rule, by reference to it, by the consent of the parties that an award may
be

be made, and, as it were, embodying an award made by consent into the rule by relation, as if the award itself was part of the rule; and whether this goes to make it payable by the rule within the meaning of the act.

1839.

JONES
against
WILLIAMS.

It is undoubtedly money payable by something arising out of, and connected with, the rule; but, then, can the award be engrafted on the rule so as to make the money payable by the rule? The difficulty that presents itself is, that there is no definite sum of money expressed to be payable by the rule itself.

These rules are to have the effect of judgments, which are to charge the land; and therefore the sum to be so charged ought to be distinctly stated in the document which thus charges the land, so that purchasers or creditors may know what it is. Judgments are to bind the land from the time directed by law. But, when rules like this are made, they also ought to bind the land at the time they are entered; but, at that time, there is nothing to inform any body of the charge: the amount may not be ascertained for a year afterwards.

It may be said that, when the award is made, it may be binding from that time. But then there is no process, or any known mode of proceeding, at present at least, for making the award a matter of record; and, if so, then a rule of this sort could have no effect till that was done; and any execution issued before that would be premature.

Then, again, there are great difficulties attending it, supposing the award could be put upon any rule, so as to make it matter of record. There may be not merely sums payable by one party alone to the other, but there

1839.

JONES
against
WILLIAMS.

may be cross payments, arising out of their mutual claims; these would have to be balanced. There may be payments dependent upon other things directed by the award. There may be other difficulties, not occurring at the moment.

We, therefore, think that the power of issuing execution on a rule must be confined to cases where the money payable by the rule is expressed in the rule itself; but which is not the case here.

There is no difficulty in giving effect to the act of parliament as to awards, if a proper case is made out: and that is, by calling on the delinquent party to shew cause why he should not pay a certain sum of money pursuant to the award. If that rule be made absolute, an execution may issue for the sum distinctly specified in the rule so to be obtained.

Rule absolute.

1839.

FERGUSON *against* MAHON.

DEBT on a judgment in an action of assumpsit in the Court of Common Pleas in *Ireland*. Plea, that though the said judgment was in fact obtained by plaintiff against defendant, defendant was not at any time arrested upon or served with any process issuing out of the said Court of Common Pleas in *Ireland*, at the suit of the plaintiff, for the cause of action upon which the said judgment was obtained as aforesaid, nor had he at any time notice of any such process, nor did he, defendant, at any time appear in the said court to answer the plaintiff in the said action on which the judgment was so obtained. Verification.

Replication; that before obtaining the said judgment, defendant had notice of certain process, to wit, of a writ of summons issuing out of the said Court of Common Pleas in *Ireland*, for the cause of action upon which the said judgment was so obtained. Verification.

Demurrer, shewing for causes that the replication neither denied, nor confessed and avoided, any fact alleged in the plea; that it tendered an immaterial issue, and that it did not shew that notice of process was suffi-

In an action of debt on a judgment in the Court of C. P. in *Ireland*, the defendant, though he cannot contest the merits of the action or the propriety of the decision, may shew that the court had not properly jurisdiction as to the defendant under the circumstances. Therefore, where the defendant pleaded to such action that he was never arrested upon, or served with, nor at any time had notice of, any process of the court at the suit of plaintiff for the cause of action on which the judgment was obtained, nor ever appeared in the action;

Held, that the plea was a good defence: Held also, on special demurrer, that a replication, alleging that, before obtaining the judgment, defendant had notice of a writ of summons, issuing out of the said court, "for the cause of action on which the judgment was so obtained," was bad.

The declaration contained counts, 1., for 189l., stated to be due on a judgment; 2., for 180l. rent. On the first count the pleadings led to an issue in law. To the second, the defendant pleaded part payment, and, issue being joined on that allegation, a jury was impannelled to try it, and to assess contingent damages on the issue in law. On the second issue there appeared to be a balance of 106l. due to the plaintiff. The jury found a general verdict for 189l. Afterwards the issue in law was decided in favour of the defendant.

Held, that the Judge might amend the verdict by his notes, and direct it to be entered for the plaintiff, on the second count only, for 106l.

1839.

FERGUSON
against
MAHON.

cient in *Ireland* to enable plaintiff to have judgment, nor that process issued at the suit of the plaintiff or against the defendant, or that defendant appeared, or had any appearance entered for him, &c. Joinder.

The demurrer was argued at the sittings in banc after last *Hilary* term (a).

Hurlstone, for the defendant, was stopped by the Court.

Butt contra. The plea is bad. It states that the defendant never was arrested or served with, or had notice of, process; nor had he appeared; but it does not shew that there are no other modes by which a party may be brought into court in *Ireland*. The judgment may have been by default. The defendant does not state that no appearance had ever been entered for him. [*Littledale* J. That would have been an appearance by him, if entered by proper authority.] The cases on colonial judgments, which will be relied upon by the defendant, are not in point. In *Buchanan v. Rucker* (b) it did not appear that the defendant was, or had ever been, within the jurisdiction of the Court; and the proceedings shewed that defect on the face of them. Here the judgment is unexceptionable on the face of it, but it is sought to impugn it by shewing extrinsic matter. If voidable, it should be set aside or reversed; but an alleged defect of process cannot make it a mere nullity. As to the replication, it avers that the defendant had notice of a writ. [*Littledale* J. That may have been notice half an hour before judgment.] It is a writ for the cause of action upon which the judgment was

(a) February 6th, 1839. Before Lord Denman C. J., *Littledale*, and Coleridge Js.

(b) 1 Campb. 63. S. C. in Banc, 9 East, 192.

obtained.

obtained. [Coleridge J. The plaintiff should have shewn notice of the writ *in the action* on which the judgment was obtained.]

1839.

FERGUSON
against
MAHON.

Hurlstone in reply. An *Irish* judgment is no record in *England*; *Harris v. Saunders* (a). It is, therefore, on the same footing as a colonial judgment, and *Buchanan v. Rucker* (b) is in point. Where the judgment in a foreign or colonial court is founded on injustice, it is not even *primâ facie* evidence of a debt, or promise to satisfy it. *Cavan v. Stewart* (c) is also in point, and shews that the defect is not cured, even by a recital in the judgment of a fact, which, if true, would have given the court jurisdiction. [Lord Denman C. J. *Becquet v. McCarthy* (d) shews that the grounds of a foreign judgment are not examinable here, unless the proceedings were plainly contrary to natural justice.] The defendant does not profess to enter on the merits, as in that case, and in *Martin v. Nicolls* (e), but to shew that the judgment was obtained by a fraud, and without any proper step taken to acquaint him with the proceeding. In *Guinness v. Carroll* (g) the defence set up to the action on an *Irish* judgment was insufficient; but the Court seems to have thought that, if the plea had shewn it to have been unduly obtained, it would have been a defence. In *Douglas v. Forrest* (h) a *Scotch* judgment obtained in the absence of the party was held valid; but there the defendant was a subject of the country in which the judgment was given, and the debt upon which it was founded was contracted there while he resided in it.

(a) 4 B. & C. 411.

(b) 1 Campb. 63. S. C. 9 East, 192.

(c) 1 Stark. N. P. C. 525.

(d) 2 B. & Ad. 951. See *Wright v. Simpson*, 6 Ves. 714. 730.

(e) 3 Sim. 458.

(g) 1 B. & Ad. 459.

(h) 4 Bing. 686.

1839. Lord DENMAN C. J. We think the replication bad;
as to the plea,

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FERGUSON
against
MAHON.

Cur. adv. vult.

Lord DENMAN C. J., in this vacation (*November 27th*), delivered the judgment of the Court.

This was an action of debt upon a judgment in the Court of Common Pleas in *Ireland*. The defendant pleads that he was never arrested, nor served, nor had at any time notice of any process at the suit of plaintiff for the cause of action upon which the judgment was recovered, and that he had never appeared thereto. The judgment, therefore, appears upon the plea to have been obtained behind the back of the defendant. The replication only asserts that, before the judgment recovered, the defendant "had notice of certain process, to wit, of a writ of summons issuing out of the said court for the cause of action upon which the judgment was obtained." This was specially demurred to, and is clearly bad, for it does not even shew that the process, of which notice is alleged, was at the suit of the plaintiff, or was the process in the action in which the judgment in question was recovered. The only question, therefore, that could be made, was on the plea, and it was argued that, if the judgment was in fact open to the objection urged in the plea, it was irregular only, and might have been set aside upon application to the Court in which it was recovered; and that we were bound to respect it as a valid judgment so long as it stood unreversed. This argument puts an *Irish* judgment, in this respect, on the same footing precisely as a judgment recovered in one of the superior courts of this country; but, although a record for certain purposes, the inquiry
is

is still open, not indeed into the merits of the action or the propriety of the decision, but whether the judgment passed under such circumstances as to shew that the Court had properly jurisdiction over the party; and when it appears, as here, that the defendant has never had notice of the proceeding, or been before the Court, it is impossible for us to allow the judgment to be made the foundation of an action in this country. The judgment, therefore, must be for the defendant.

S. Judgment for the defendant (a).

The declaration in this case contained three counts. 1. For 139*l*. due on a judgment, as to which the defendant pleaded that he never was indebted, and also the plea above stated. 2. For 180*l*. due on a covenant, in an indenture of demise, to pay rent. 3. For 300*l*. found due on an account stated. Plea, as to 135*l*., parcel of the rent claimed in the second count, that plaintiff held under *Carter*; that, before and at the time when the 135*l*. in the plea &c. became due, 135*l*. rent was in arrear from plaintiff to *Carter*, who claimed that amount from defendant, and defendant paid it to *Carter*, to avoid a distress. Replication, that the rent so paid was deducted by defendant out of rent then due to plaintiff on the above demise, and that, at the commencement of this suit, the said 135*l*., parcel &c., was still due from defendant to plaintiff for the term &c., over and above &c. Verification. Rejoinder, denying these averments, and concluding to the country. Issue thereon. There were other pleas, which also led to issues in fact. On the trial of these issues before Lord Denman C. J. at the *London* sittings after *Trinity* term, 1838, the plain-

1839.

FERGUSON
against
MAHON.

(a) See *Smith v. Nicolls*, 5 *New Ca.* 208.; *Bruce v. Wait*, 1 *Mann. & Gr.* 1.

1839.

FERGUSON
against
MAHON.

tiff's counsel, in opening the case, claimed 106*l.* 16*s.* 6*d.* for rent. He gave in evidence an examined copy of the judgment, and proved the indenture of lease. It was then objected, on the part of the defendant, that on the pleadings to the second count nothing appeared to be due. No evidence was given for the defendant. The jury, who were impannelled to assess damages on the issues in fact, and contingent damages on the demurrer, found a general verdict for 139*l.*; and the learned Judge reserved leave to move to enter a nonsuit (*a*). After the Court had given judgment on the demurrer as above stated, a summons was obtained, calling on the defendant to shew cause, before Lord *Denman* C. J. at chambers, why the verdict should not be amended agreeably to his Lordship's notes taken at the trial; and, upon the summons, the Lord Chief Justice directed the verdict to be entered for the plaintiff on the second count for 106*l.* 16*s.* 6*d.*, and for the defendant on the third count. In *Hilary* term, 1840 (*b*),

Hurlstone moved for a rule to shew cause why the order of Lord *Denman* C. J. should not be rescinded. The damages should have been assessed separately on the first and second counts. The Judge has power to amend by his note only for the purpose of correcting a wrong entry, and of giving effect to the real finding of the jury. Where the evidence has applied to one count only, and the verdict has been general, he may restrain it to the single count, if the finding be referable to that. But he cannot so far perform the office of a jury as to find a verdict for damages on a particular count, where

(*a*) The Court refused a rule; *Ferguson v. Mahon*, 9 *A. & E.* 245.

(*b*) January 11th. Before Lord *Denman* C. J., *Littledale* and *Cole-ridge* Js.

they

they have given no such damages. Here the jury have in fact found the contingent debt only. If they have so far failed in performing their office, the only remedy is by a venire de novo. The rules on this subject are collected in 2 *Archbold's Practice* (a) 1130. B. 4., part 1. c. 30. s. 2. That the courts will not interfere with the jury's decision as to amount appears from *Baker v. Brown* (b). [Lord Denman C. J. The verdict now stands for the plaintiff as to the excess of rent beyond that which the defendant (as it appeared in evidence) was obliged to pay the superior landlord, and for the defendant on the other issues. This is the proper finding; the question is, whether we are to suppose that the jury did what was right at the trial.]

1839.

FERGUSON
against
MAHON.

Cur. adv. vult.

LORD DENMAN C. J., in the same term, *January 15th*, delivered the judgment of the Court. After stating the substance of the issues in law and fact, and the verdict, his Lordship said: On the demurrer we held the replication insufficient, and the plea good. An application was then made that the verdict might be entered, on the other issues, according to the note taken at the trial. On the second count the plaintiff's case was clear as to the amount of rent due after deducting the payment to the superior landlord. I directed the verdict to be entered accordingly; and a motion has now been made to set aside that direction, on the ground that I had no authority to give it. But there can be no doubt that the verdict was given, and the damages assessed, in respect of the rent only. There will therefore be no rule.

Rule refused.

(a) 7th, *Chitty's*, ed. 1840.

(b) 2 *M. & W.* 199.

1839.

*Wednesday,
November 27.***EMPSON against GRIFFIN.**

Where one of several counts in a declaration for slander was bad, and some of the defamatory words in it were proved at the trial, and the jury found a general verdict, with damages, for the plaintiff, the Court set aside an order of the Judge who tried the cause to confine the verdict and damages to one of the good counts, and awarded a venire de novo.

CASE for slander. The first count stated, in the introductory part, that the plaintiff was an attorney, and a colloquium of and concerning the plaintiff in his said profession; and then set out certain defamatory words reflecting upon plaintiff in his character of attorney. There were six other counts, one of which, the fifth, contained no averment or colloquium concerning the plaintiff's profession, nor any reference to the introductory statement in the first count, but only set out defamatory words imputing dishonesty to the plaintiff. Plea, not guilty.

On the trial before *Park J.*, at the Spring assizes, 1838, at *Warwick*, the jury found a general verdict for the plaintiff, damages 15*l*. Some of the words attributed to the defendant in the fifth count were proved at the trial. In the following *Easter* term *Balguy* obtained a rule nisi to arrest judgment, because the words in the fifth count were not actionable without reference to the profession of the plaintiff. A few days afterwards, an order was obtained from *Park J.* to enter a verdict for the plaintiff on the first count, and for the defendant on all the others. In the same *Easter* term, *May* 1st, *Mellor* obtained a rule nisi to set aside the above order, on the ground that some of the words complained of in the fifth count were actually proved, and the jury might have been influenced by them in assessing the amount of damage. Both rules came on for

for argument at the sittings in banc after *Trinity* term last (a).

1839.

EMERSON
against
GRIFFIN.

Goulburn Serjt., *Humfrey*, and *Hughes*, for the plaintiff, relied on *Williams v. Breedon* (b) to shew that the judge had power to amend the *postea*, although evidence had been given upon a bad count; and they contended that, at all events this court would not interfere with the discretion of the judge after the amendment was made.

Balguy and *Mellor*, *contra*, cited *Spencer v. Goter* (c) and *Eddowes v. Hopkins* (d), to shew that judgment must be arrested.

Cur. adv. vult.

LORD DENMAN C. J. in this vacation (*November 27th*) delivered the judgment of the Court.

In this case we are of opinion that the order for confining the verdict to the first count was wrong, inasmuch as evidence was given at the trial applicable to the fifth count, as well as to the first; and the damages being general, it cannot be known what amount of them the jury meant to ascribe to each. That order must, therefore, be set aside.

The fifth count is clearly bad, and, according to the older decisions, judgment ought to be arrested; but in the late case of *Leach v. Thomas* (e) the Court of Exchequer, following the rule adopted by courts of error in *Angle v. Alexander* (g) and *Day v. Robinson* (h), held

(a) *June 17th*. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams* J.

(b) 1 B. & P. 329.

(d) 1 Doug. 376.

(g) 7 Bing. 119.

(c) 1 H. Bl. 78.

(e) 2 M. & W. 427.

(h) 1 A. & E. 554.

that,

1839.

EMERSON
against
GRIFFIN.

that, under such circumstances, a venire de novo ought to be awarded. Such must be the rule in the present instance.

Rule absolute to set aside the judge's order.

S.

Venire de novo awarded.

DOE dem. NOBLE *against* BOLTON.

Testator devised the manor of A., and also a mansion house, to trustees, in trust to permit and suffer his wife, in case she should wish so to do, to occupy the same, and to receive the rents and profits thereof, until his son was of age, provided she remained unmarried; and, on the son attaining twenty-one, then in trust to release, convey, and assure the manor and mansion to the son in fee: provided that in case the wife married again, or should not wish to reside in the mansion, the trustees should let the mansion until the son attained twenty-one.

EJECTMENT upon a notice to quit given by *Helen Noble*, widow of *Mark Noble* and one of the lessors of the plaintiff.

On the trial before *Patteson J.*, at the *York Spring* assizes 1838, one of the points that arose was, whether the legal estate was in *Helen Noble*, or in the trustees named in the will of *Mark Noble*. The will was in the following form: — “I give, devise, and bequeath all that my manor or lordship of *Aislaby* aforesaid, with the rights, royalties, privileges, and appurtenances to the same belonging, and also all that my capital messuage or mansion wherein I now dwell, with the several stables and outbuildings, and the gardens, orchards, and pleasure grounds contiguous thereto, and all now in my own occupation, unto *John Elgie* of *Ruswarp* aforesaid, miller, and *John Lawson* the younger, of *Whitby* aforesaid, draper, their heirs and assigns, upon the trust nevertheless, and to and for the several ends, intents, and purposes hereinafter expressed and declared of and

the trustees should let the mansion until the son attained twenty-one.

Held that, although the trustees must take the legal estate in order to convey to the son when of age, that alone would not prevent the widow from taking the legal estate in the meantime.

And, that whatever might be the construction of the will as to the mansion, the legal estate in the manor vested in the widow until the son attained twenty-one; because the permission to occupy, and the directions as to letting, applied to the mansion only, and not to the manor.

concerning

concerning the same; that is to say, in trust to permit and suffer my said wife, in case she wish so to do, to occupy the same, and to receive the rents, issues, and profits thereof, until my son *Mark Noble* shall attain the age of twenty-one years, provided she, my said wife, so long remain my widow and unmarried; and upon the attainment to age of my said son, then in trust to release, convey, and assure the same manor, mansion house, and hereditaments unto and to the use of my said son, his heirs and assigns for ever: provided nevertheless, and it is my will and mind, that in case of my said wife marrying again, or of her not wishing to reside in my said messuage or mansion house, then my said trustees shall thereupon let my said mansion house, buildings, gardens, and appurtenances held therewith, for the best rent that can be obtained at the time, unto any person or persons who may be willing to take the same and keep the same in good repair, until my son shall attain the age of twenty-one years as aforesaid." The premises for which the action was brought were parcel of the manor of *Aislaby*. At the time of action brought, the testator's son, *Mark*, was under the age of twenty-one.

The plaintiff was nonsuited, with liberty to move to enter a verdict for him. In the following term, *Bliss* obtained a rule nisi accordingly. At the sittings in banc after *Trinity* term, 1839 (*a*),

Starkie and *S. Temple* shewed cause. The notice to quit should have been given by the trustees in whom the legal estate is vested. The words, "in trust to

(a) June 18th. Before Lord Denman C. J., *Littledale*, *Patterson*, and *Williams* Js.

1839.

Dox dem.
Noble
against
Bolton.

permit

1839.
 ———
 Doe dem.
 Noble
 against
 Boulton.

permit and suffer my wife to occupy" &c., taken separately, would indeed give her the legal estate according to *Doe dem. Leicester v. Biggs* (a); but that rule of construction only applies where there is nothing else for the trustees to do. Here they are to release and convey all the devised premises in a certain event, which implies the continuance of the legal estate in them. The same inference may be drawn from the provision enabling them to let the premises in case Mrs. Noble married again, or did not wish to reside in them. In *Doe dem. Player v. Nicholls* (b), a devise of copyhold land to trustees in trust for the testator's son, "to be transferred to him as soon as he should attain to twenty-one years of age," was held to give to the trustees a legal estate determinable on the son's attaining that age. The words "release and convey" are stronger than "transfer;" for a transfer of copyhold might have been effected without any legal conveyance or instrument, such as the will requires in this case. It is doubtful, too, whether, by the statute of uses, 27 Hen. 8. c. 10. s. 1., a conveyance or devise to A. for the qualified and defeasible use of B., will vest the legal estate in B. The legal estate, when vested, ought to be co-extensive with, and of the same nature and quality as, the use. In this case the remainders over may be defeated for want of trustees to preserve contingent remainders, unless the legal estate be held to continue in the trustees under the will.

Bliss, contra. The cases are all collected and considered in *Barker v. Greenwood* (c), where *Parke B.*

(a) 2 Trust. 109.

(b) 1 B. & C. 336.

(c) 4 M. & W. 421.

places no reliance on the argument suggested from the possible destruction of contingent remainders. In fact, there is no such danger here; for there may be a springing use in the trustees, or a conditional limitation, to take effect on the determination of Mrs. Noble's estate. The defeasible nature of the use will not prevent the execution of it, but the legal estate will be co-extensive with the use, and defeasible like it. The question for the Court is, not what effect the forfeiture or determination of Mrs. Noble's interest may have on the legal estate, but whether the use was executed in her when this action was brought.

1839.

DOX dem.
Noble
against
Bolton.

Cur. adv. vult.

Lord DENMAN C. J. in this vacation (November 30th), delivered the judgment of the Court.

The principal question in this case is, what estate Mrs. Noble took in the premises in question under the will of her late husband.

Upon an attentive perusal of that will, we are of opinion that a distinction is made between the manor of *Aislaby* with its appurtenances (of which the premises in question are parcel), and the mansion house with the appurtenances stated in the will to have been in the occupation of the testator.

The devise is of the manor with its royalties and appurtenances, and also of the mansion house with its appurtenances, to trustees and their heirs in trust. [Here his Lordship read the passages in the will stated above.] It is plain that the trustees must take the legal estate after the death of Mrs. Noble, in order to convey the same to her son; but that alone will not prevent her from taking the legal estate in the meantime.

Again,

1839.

DOE dem.
 NOBLE
 against
 BOLTON.

Again, it is plain that the words "to permit and suffer *A. B.* to receive the rents, issues, and profits," are to be construed, in general, as passing the legal estate to *A. B.*, unless there be anything which the trustees are directed to do, and which makes it necessary for *them* to take the legal estate. Here it was contended that the restriction as to occupation "in case she wish so to do," and the clause directing the trustees, in case Mrs. *Noble* should not wish to occupy, to let, make it necessary that they should take the legal estate. But, on an attentive consideration of the will, it will be found that that restriction, and that direction to the trustees, apply only to the mansion house with the appurtenances, and not to the manor with the appurtenances. The words are, "to permit and suffer her, in case she wish so to do, to occupy the same, and receive the rents, issues, and profits thereof." We think these words must be taken *reddendo singula singulis, i. e.* to permit her to occupy the mansion house, and to receive the rents of the manor. Again, in the clause empowering the trustees to let, the word "manor" seems purposely omitted.

Whatever, therefore, might be the construction in respect of the mansion house with the appurtenances, we are of opinion that the legal estate in the premises in question in this action vested in Mrs. *Noble* till her son attained twenty-one years, which time has not yet arrived; and as she gave a regular notice to quit to the defendant, the other questions raised in the case become immaterial. The rule must be made absolute to enter a verdict for the plaintiff on the demise of Mrs. *Noble*.

S.

Rule absolute (*a*).

(a) See *Doe dem. Cadogan v. Ewart*, 7 A. & E. 636.; *Ackland v. Lutley*, 9 A. & E. 879.

1839.

JONES *against* THOMAS.Tuesday,
November 26.

TRESPASS quare clausum fregit, and for an assault and battery. Pleas, Not Guilty, and a justification of the battery. The pleas were pleaded since *Reg. Gen. Trin. 1 Vict. (a)*, and the words "by statute" were not added. At the trial before *Williams J.*, at the last Spring assizes for *Flintshire*, the jury found a verdict for the plaintiff with a farthing damages, and the judge certified under 43 *Eliz. c. 6.* to deprive the plaintiff of costs.

Where the plea of Not Guilty was pleaded to an action of trespass quare clausum fregit, omitting the words "by statute," and the plaintiff recovered a farthing damages. Held, that he was entitled to full costs.

In *Easter* term last, *Jervis* obtained a rule to shew cause why it should not be referred to the Master to tax full costs, notwithstanding the certificate.

Cresswell now shewed cause, and contended that, although the certificate was inoperative, the plaintiff was entitled to no more costs than damages under 22 & 23 *Car. 2. c. 9. s. 136.*; and he relied on *Dunnage v. Kemble (b)* and *Purnell v. Young (c)*.

Jervis, contra. As the words "by statute" are omitted, the defendant cannot avail himself of any statutable defence, and therefore the freehold or title of the land cannot come in question. The law, as laid down in *Hughes v. Hughes (d)*, is therefore restored.

Per Curiam (e). The rule must be made absolute.

S.

Rule absolute (*g*).

(a) 8 *A. & E.* 279. (b) 3 *New Ca.* 538. (c) 3 *M. & W.* 288.

(d) 2 *C. M. & R.* 663. *S. C.* 1 *Tyr. & G.* 4.

(e) Lord Denman C. J., *Patteson, Williams, and Coleridge Js.*

(g) See now stat. 3 & 4 *Vict. c. 24.*

1839.

Tuesday,
Nov. 26th.

The QUEEN *against* The SHEFFIELD, ASHTON-
UNDER-LYNE, and MANCHESTER Railway
Company.

A railway act (stat. 7 W. 4. c. xxi. local and personal, public) directed that the purchase money of lands taken by the company should be assessed by a jury impanelled by the sheriff or under-sheriff, or, in case they should be interested, by certain other persons specified therein, to whom a warrant was to be issued by the company, and by whom the jury and witnesses were to be sworn. It also provided that the verdict and judgment should be deposited with the clerk of the peace, and be deemed records to all intents and purposes; and that no proceeding taken in pursuance of the act should be removed by certiorari.

Held, that a certiorari would not lie to remove an inquisition on the ground that it was taken before two persons, (namely, an assessor, and a clerk of the under-sheriff by whom the jury and witnesses were sworn,) appointed *pro hac vice* by the sheriff, but not being any of the persons specially named in the act.

SIR FREDERICK POLLOCK obtained a rule nisi, in *Easter* term last, for a certiorari to remove an inquisition taken under stat. 7 W. 4. c. xxi. (Local and Personal, Public) for making a railway from *Sheffield* to *Manchester*.

Section 65. of that act provided that if persons interested in any lands which should be used for the purposes of the act, should not agree with the company as to the amount of purchase money, &c. then the company should issue a warrant "to the sheriff of the county" in which the lands are situate, or in case "such sheriff or his undersheriff" should be one of the company, or otherwise interested, "then to some person then living in the county, and free from personal disability, who shall have filled the office of sheriff, undersheriff, or coroner in the said county," and not interested, &c. commanding such sheriff, undersheriff, coroner, or other person, to impanel, summon, and return a jury of at least eighteen sufficient and indifferent men qualified for the time being, according to the laws of this realm, to be returned for trials of issues in his Majesty's courts of record at *Westminster*, &c.; that out of such persons so impanelled, a jury of twelve men should be drawn by

the

the said sheriff, undersheriff, coroner, or other person, "or by some person to be by them respectively appointed" in such manner as jurors for trial of issues, &c.; and all parties concerned should have their lawful challenges against the jury, but not the array; and the sheriff, undersheriff, coroner, or other person was thereby required, on request by either party, to summon all witnesses, to order a view if he should see fit, &c., and to administer oaths and affirmations as well to the jurors as the witnesses. The sheriff, undersheriff, coroner, or other person, was to give judgment accordingly for the purchase money, &c. assessed by the jury, which verdict and judgment were to be "binding and conclusive to all intents and purposes," upon all persons whatsoever.

Section 67. provided, that the verdicts and judgments, being first signed by the sheriff, undersheriff, coroner, or other person presiding at the taking and pronouncing of the same, should be deposited with the clerk of the peace among the records of the quarter sessions for the county, and "be deemed records to all intents and purposes."

By sect. 220., no proceeding to be had or taken "in pursuance of this act," was to be quashed or vacated for want of form, or removed by certiorari, &c.

Section 231. required notice, and prescribed a limitation of time and venue in all actions brought against any person or corporation for any thing done, or omitted to be done, "in pursuance of" the act, or in the execution of the powers given by it. The defendant in any such action was allowed to plead the general issue.

It appeared [that the inquisition in the present case

1839.

—
The QUEEN
against
The SHEFFIELD
Railway
Company.

1839.

The QUEEN
against
The SHEFFIELD
Railway
Company.

had been taken before a clerk of the undersheriff, and an assessor, specially appointed by the sheriff as his deputies for that purpose; the jurors and witnesses being sworn by the clerk. Neither sheriff nor undersheriff was present. The inquisition returned to the quarter sessions purported to have been taken by the sheriff, and was under his seal of office. The rule was moved for on behalf of the party who claimed compensation, and who was dissatisfied with the amount assessed.

On reference being made to the clause taking away certiorari, the Court called upon

Sir *F. Pollock*, *Tomlinson*, and *Cole*, in support of the rule. The clause is intended to apply only to convictions for penalties under the preceding sections of the statute. [Sir *J. Campbell*, contra, referred to *Regina v. The Bristol and Exeter Railway Company (a)*,¹ where a similar clause was considered applicable to inquisitions. *Cole-ridge J.* also referred to *Rex v. The Justices of the West Riding of Yorkshire (b)*.] If no certiorari lies in this case, there will be no remedy, for as the judgment is made binding and conclusive to all intents and purposes, and on all persons, and is to be deemed a record to all intents, it will be a decisive answer to an action of trespass. It was indeed suggested by *Patteson J.* in *Regina v. The Bristol and Exeter Railway Company (a)*, that a defendant who justified under such proceedings would have to shew every thing necessary to bring him within the act; but there no provision for making the proceedings conclusive was brought under the notice of the Court. The sheriff had no authority to appoint

(a) See note (a), p. 202. post.

(b) 1 A. & E. 563.

deputies

deputies other than such as are pointed out by the act, and the proceeding was therefore not under the act at all, and a certiorari lies: *Rex v. The Justices of the West Riding of Yorkshire* (a), *Rex v. The Justices of Somersetshire* (b), *Rex v. The Justices of Derbyshire* (c). It will be objected that, if the proceeding be, as it is, coram non judice and void, then the Court will not interfere; but a certiorari is often awarded where the party is in peril by a void judgment or other proceeding. Thus where the justices at sessions have no authority to order the estreat of a recognizance, a certiorari lies to remove the order for the purpose of quashing it. *Regina v. The Justices of the West Riding of Yorkshire* (d). Here the judgment, if not an absolute estoppel, will at all events be primâ evidence against the party, who is therefore in jeopardy. [Patteson J. If it be a record, and good in form, can we examine into the truth on affidavit?] The validity of a record ex facie will not prevent the party from controverting its regularity by affidavit upon a removal into this Court. This was admitted in argument in *Rex v. The Parishioners of St. James, Westminster* (e), and cases to the same effect are cited in *Rex v. The Justices of Cheshire* (g). The cases of *Rex v. The Justices of St. Albans* (h) and *Rex v. Casson* (i), where the writ was refused, are distinguishable; in the former there was a remedy by appeal; in the latter there was a sufficient jurisdiction, and a mere informality in the proceedings was alleged.

1839.

—
The QUEEN
against
The SHEFFIELD
Railway
Company.

(a) 5 T. R. 629.

(b) 5 B. & C. 816.

(c) 2 Ld. Kenyon, 299.

(d) 7 A. & E. 583.

(e) 2 A. & E. 241.

(g) 8 A. & E. 398. See *ibid.* 400.

(h) 3 B. & C. 699.

(i) 3 D. & R. 36.

1839.
 ———
 The QUEEN
 ag't
 The SHEFFIELD
 Railway
 Company.

Sir *J. Campbell*, Attorney General, Sir *W. W. Follett*, and *Wightman*, contra. It does not follow from the clause cited that the inquiry must be executed in person by those to whom the warrant is to be addressed. Writs of inquiry, though addressed to the sheriff, are always executed by the under-sheriff, or some person specially deputed pro hac vice, and the maxim "qui facit per alium facit per se" applies. [*Patteson J.* The under-sheriff represents the sheriff himself in all ordinary acts of his office, and does all acts in his name; but it is not so with a deputy sheriff.] If the presiding officer is admitted to be an improper one, yet the vice in the appointment is not stronger than in the selection of the jurors in *Regina v. The Bristol and Exeter Railway Company (a)*, where this Court nevertheless refused the writ. Here the whole proceeding is a creature of the legislature, and this Court has no other jurisdiction over it than the statute gives. If a statute were to create a new court for the trial of actions under the value of 40s., and were to take away the writ of certiorari, this Court could not interfere, though the inferior jurisdiction entertained a suit for 5*l.* But, supposing a clear excess would warrant the interposition of this Court, the present is not such a case. It is a defect or irregularity which does not make the proceeding the less a proceeding "in pursuance of the act," and under colour of the act; though it may in some respects have omitted to conform to it. If it were otherwise, any trifling informality, as the temporary absence of the sheriff, or his relationship to one of the parties, might defeat the inquisition, and let in a certiorari. The same

(a) See note (a), p. 202. post.

words are used in section 231, which gives parties sued the benefit of notice, the general issue, &c.; if, therefore, the construction contended for on the other side is correct, an irregularity will also deprive the party of the protection of that section, as well as of sect. 220. The mischief will be obvious. Parties will always lie by till they see the result, and then set aside the proceedings by reason of some trifling informality, from which no real injury has in truth resulted. The provision for taking away the certiorari will be rendered of no value; for if the inquisition is regular, the provision will not be wanted; if irregular, then all will be coram non judice, and a certiorari will issue. The argument of hardship and of want of remedy may be plausible, but must be taken to have been disregarded by the legislature. The possibility of private grievance has been considered as balanced by the public advantage. Then it is urged that, as the act has made the judgment of the sheriff a conclusive record, this Court ought to be the more disposed to construe largely its right of interference; but that provision rather suggests an inference that the judgment was not to be examinable, or contradicted by extrinsic averments.

LORD DENMAN C. J. I cannot accede to some of the positions laid down in argument against the interference of this Court. This Court holds a jurisdiction over all inferior courts, which can only be taken away or limited by statute, and I hear with some surprise the case, put in the course of argument, of a new court exceeding its jurisdiction, and yet supposed to be exempt from the restraint of this Court. I cannot consider *Regina v. The Bristol and Exeter Railway*

1839.

The QUEEN
against
The SHEFFIELD
Railway
Company.

1839.

—
The QUEEN
against
The SHEFFIELD
Railway
Company.

Company (a) to be an authority for any such doctrine. That is not its fair import: we there thought that when an act done is visibly out of the jurisdiction of a court, it is wholly void, and the party aggrieved has a sufficient remedy by action. That is not so here. It is sought to shew a want of jurisdiction by extrinsic evidence, and in a case where the proceedings are made "records to all intents and purposes." In such a case, the dilemma suggested by my Brother *Patteson* in *Regina v. The Bristol and Exeter Railway Company (a)* does not occur; for I apprehend that the record of the inquisition would be a conclusive bar, and would protect a wrong doer in an action. Without therefore disclaiming the right and duty of this Court to correct any excess of jurisdiction, it is enough for the present to say, that this is not such a case. The company and the sheriff take proceedings under the act, and the verdict and judgment are not so far *not* in pursuance of the act as to warrant us in issuing the writ.

PATTESON J. I entirely agree. A distinction has been made between a total want of jurisdiction, in which case the clause for taking away the writ of certiorari has been held inapplicable, and a mere irregularity in the exercise of jurisdiction, in which case it does apply. I am not sure that I was altogether correct in what I said in *Regina v. The Bristol and Exeter Railway Company (a)*; but here there is no such dilemma, for the record of the inquisition and judgment would be conclusive in any action. Perhaps there may have been

(a) See note (a), p. 202. post.

the same provision in the act for *The Bristol and Exeter Railway* (a); but it was not adverted to, or relied upon. Is this then a proceeding in pursuance of the act? I apprehend it is. It duly originated in a warrant; and no other irregularity appears than the one complained of. Whether the sheriff could lawfully appoint a deputy for the purpose of taking the inquisition may be doubtful. The case of a writ of trial is expressly provided for by 3 & 4 W. 4. c. 42. s. 18. According to *Denny v. Trapnell* (b), the sheriff may appoint one deputy, but not two or more deputies, to execute a writ of inquiry. But, at all events, a deviation from the requisitions of the act in this respect is a mere irregularity, and not an excess of jurisdiction.

1839.

The QUEEN
against
The SHEFFIELD
Railway
Company.

WILLIAMS J. It is too late now to enquire whether this Court can examine into the records of inferior courts, or to deny that the want of jurisdiction may be disclosed by affidavits. If there was no jurisdiction, no doubt this Court is competent to correct so radical an error. But this was clearly a proceeding in pursuance of the act, and the error or informality, if any, is not sufficient to enable this Court to interfere.

COLERIDGE J. I do not impugn the cases cited; nor is it necessary to justify every thing that may have been said by the Court in *Regina v. The Bristol and Exeter Railway Company* (a). In this case extrinsic evidence was offered to shew a want of jurisdiction; but in fact it shews that there was jurisdiction, and that the proceeding was properly originated. A sub-

(a) Note (a), p. 202. post.

(b) 2 Wils. 378.

1839.

The QUEEN
against
The SHEFFIELD
Railway
Company.

sequent act, irregularly done in the course of the proceeding, was not enough to destroy the jurisdiction. If it were, then the examination of a single witness without swearing him would be sufficient to vitiate the inquisition. The principle of the objection to this inquisition is the same; for it is here contended that none of the witnesses were duly sworn. The argument drawn by Mr. *Wightman* from sect. 231 is very cogent; for it cannot be doubted that such an irregularity as this would not deprive a party of the protection of that clause. The proceeding was clearly taken, *bonâ fide*, in pursuance of the powers of the act.

S.

Rule discharged with costs (a).

May 9th 1838. (a) The QUEEN against The BRISTOL and EXETER Railway Company.

A railway act (6 & 7 W. 4. c. xxxvi.) directed that compensation for lands taken by the company in certain cases should be assessed by a special jury; that the deviation from the line of railway mentioned in the act should not exceed a specified distance; and that no proceedings taken in pursuance of the act should be removed by certiorari.

SIR J. Campbell, Attorney General, obtained a rule in *Hilary* term, 1838, for a certiorari to bring up an inquisition taken under stat. 6 & 7 W. 4. c. xxxvi. (local and personal, public), "for making a Railway from *Bristol to Exeter*, with branches" &c. The act empowered the company to take lands, &c.; and sect. 25 required them, in case of difference between themselves and the owner, &c., of any mansion-house, park, or pleasure grounds which should be taken or injured in execution of the powers given by the act, to cause a jury to be impanelled, summoned, and returned, of such persons as are "usually summoned to serve on special juries at the assizes" of the county in which the difference should arise, to assess purchase-money and compensation. In the case of other lands taken, &c., the jury was to be of men "qualified according to the laws of this realm to be returned for trials of issues in his Majesty's courts of record at *Westminster*." Sect. 59 enacted that the company should not deviate from the line drawn on the maps deposited with the clerks of the peace, to a greater distance than 100 yards. Sect. 235 enacted, "That no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or be removed by certiorari, or by any other

A certiorari was applied for to remove an inquisition, on affidavits that the jury appeared by the inquisition not to be special, though the case was one in which a special jury was requisite; and that there had been a deviation greater than the act allowed.

Writ refused, because, if the proceedings were in pursuance of the act, the certiorari was taken away, and, if not in pursuance of the act, they were merely void.

writ

writ or proceeding whatsoever, into any of his Majesty's courts of record at *Westminster* or elsewhere, any law or statute to the contrary notwithstanding."

The present inquisition had been holden under the statute before the sheriff of *Somerset*, to assess compensation to *Charles Henry Payne, Esq.*, for property of the description given in sect. 25 as first above cited. The inquisition purported to be taken on the oaths of *A., B., C., D., &c.*, good and lawful men &c., qualified according to law, "to serve on juries in her Majesty's courts of record at *Westminster*." It appeared on affidavit that the railway, where it interfered with Mr. *Payne's* property, deviated from the line laid down in the maps, to a distance varying from 107 to 129 yards.

Sir *W. W. Follett* and *Talbot* now shewed cause. If the proceedings objected to are taken in pursuance of the act, the certiorari is prohibited by sect. 235. If they are not so taken, they are merely null, and the certiorari is unnecessary. On this supposition, if the proceedings be acted upon, the parties acting will be liable in trespass. *Rez v. The Trustees of the Norwich and Watton Road* (5 *A. & E.* 563.) is inapplicable: the certiorari was there granted because the clause prohibiting it was thought not to apply to the proceeding in question. In the case *In the Matter of the London and Greenwich Railway Company* (2 *A. & E.* 678.) it was considered that a mandamus ought not to go to direct an assessment, where an assessment had already been taken, though not in strict conformity with the local act.

Sir *John Campbell*, Attorney General, and *Fitzherbert*, contra. This application is warranted by *Rez v. The Justices of Somersetshire* (5 *B. & C.* 816.) and *Rez v. The Justices of the North Riding of Yorkshire* (6 *B. & C.* 152.). The Highway Act, stat. 13 G. 3. c. 78. s. 48., directed that the accounts of surveyors should be allowed in a particular manner; but this Court removed and quashed accounts allowed without jurisdiction. The objection now taken would have applied in those cases, since it might have been said that the proceedings were merely null, or that, if they were not, sect. 80, which takes away the certiorari, applied. In *Rez v. The Parishioners of St. James, Westminster* (2 *A. & E.* 241.), where an order of two justices was brought up by certiorari, and it was moved to quash the order on affidavits shewing want of jurisdiction, *Taunton J.* said that this had been constantly done. It is argued that, if the proceedings be null, the certiorari is unnecessary. But the Court will interfere, on behalf of the subject, to quash proceedings having the form of regular and legal acts, which, if they remain undisturbed, will hereafter have a *prima facie* character of authority. Awards which are bad on their face are constantly set aside by the courts. And here the difficulty is increased by the circumstance that the proceedings were had in pursuance of the act,

1839.

The QUEEN
against
The BRISTOL
and EXETER
Railway
Company.

1839.

The QUEEN
against
The BRISTOL
and EXETER
Railway
Company.

act, except as to the parts of the land taken with respect to which the provisions of the act have not been pursued. The company lose² their authority by not adhering to the line; *Lee v. Milner* (2 *Mec. & W.* 824. See p. 839.). [Lord DENMAN C. J. mentioned *Rex v. The Justices of the West Riding of Yorkshire* (1 *A. & E.* 563.)] There the jury had jurisdiction on the subject-matter, and pursued the act in all respects, except that the verdict (as contended) was illegal in a particular finding. But here, the jury not being special, and the deviation having taken the case out of the power conferred by the act, the proceedings are illegal throughout. The illegality as to part makes the residue illegal; and certiorari lies to bring up the whole proceeding; *Rex v. Saunders* (5 *D. & R.* 611.).

LORD DENMAN C. J. The legislature took away the certiorari, with the view of preventing the Court from being encumbered with these questions. If the argument in behalf of this rule could prevail, the slightest question of the kind would make the clause nugatory. In *Rex v. The Justices of Somersetshire* (5 *B. & C.* 816.) there was no jurisdiction; the proceedings were coram non iudice. If that be so here, the proper remedy will be an action of trespass, whenever parties attempt to act on what is a mere nullity. If not, the proceedings are taken under the act, and the clause taking away the certiorari applies.

LITLEDALE J. If the company had jurisdiction there can be no certiorari. It is said that, if there be any violation of the provisions of the act, the proceedings become illegal and should be quashed. If this were so, there would be a certiorari in almost every case; for there would be almost always something to find fault with. But the parties applying are not without remedy; for they may bring trespass if the proceedings be void. The Attorney General argues that there will be a *prima facie* justification if the proceedings be not quashed. I doubt whether that would be so in any case: but clearly it would not be so where there has been a deviation from the line laid down.

PATTERSON J. *Rex v. The Trustees of the Norwich and Watton Road* (5 *A. & E.* 563.) was decided on the ground that, the two acts being looked at together, the certiorari was not taken away as to the proceeding there in question. That is not an authority here: for there can be no doubt that the clause taking away the certiorari does apply to such a case as this. I cannot think that proceedings cease to be taken in pursuance of this act because the act is not quite strictly pursued: were that so, the Court would have scarcely any thing else to do but to discuss questions of this kind. That, indeed, would not be a sufficient reason for not granting this certiorari: but how is the difficulty got at? A certiorari does not go against mere volunteers who act without authority, but only to remove the proceedings of inferior jurisdictions. If, then, these

these proceedings are within such a jurisdiction, the clause applies: if not, the certiorari applied for would be against mere strangers; and that the Court will not grant. It is suggested that here the proceedings might constitute a justification in trespass. But that is not so: the defendant then would have to plead in express terms matter which would bring him within the act: and such matter might be traversed by the plaintiff.

COLERIDGE J. concurred.

Rule discharged.

See *Re v. The Justices of Cambridgeshire*, 4 A. & E. 111, 124, 125.

1839.

The QUEEN
against
The BRISTOL
and EXETER
Railway
Company.

HUMBLE against MITCHELL.

Wednesday,
Nov. 27th.

ASSUMPSIT by the purchaser of shares in a joint stock company, called the Northern and Central Bank of *England*, against the vendor for refusing to sign a notice of transfer tendered to him for signature, and to deliver the certificates of the shares, without which the shares could not be transferred.

Pleas. 1. That the contract mentioned in the declaration was an entire contract for the sale of goods, wares, and merchandizes for a price exceeding 10*l.*, and that plaintiff had not accepted or received the said goods, &c., or any part thereof, and did not give any thing in earnest to bind the bargain, or in part payment, and that no note or memorandum in writing of the bargain was made and signed by defendant or his agent thereunto lawfully authorised. Verification.

2. That the contract was a contract for the sale of, and relating to, an interest in and concerning lands,

of this plea, that it was not enough for defendant to shew by parol evidence that the company was in the actual possession of real estate, without further proof of the title of the company, and the interest of the shareholders therein.

Quære, whether, supposing the company to be the proprietors of land, such share is an interest in land within sect. 4 of the Statute of Frauds?

Shares in a joint stock banking company are not goods, wares, or merchandizes, within sect. 17 of the Statute of Frauds, 29 Car. 2. c. 3.

In assumpsit for refusing to complete a transfer of such shares sold by defendant to plaintiff, defendant pleaded that the contract was for the sale of an interest in land belonging to the company, and that there was no memorandum in writing, &c., according to the form of the statute. Held, upon a traverse

tenements,

1839.

HUMBLE
against
MITCHELL.

tenements, and hereditaments of and belonging to the said company, and that there was not in respect of, or relating to, the said contract, an agreement or any memorandum or note thereof in writing signed by defendant, or by any other person thereunto by him lawfully authorised according to the form of the statute &c. Verification.

Replication : to the first plea, denying that the contract was for the sale of goods, wares, &c. : to the second, denying that it was for the sale of an interest in lands &c. Issues thereon.

At the trial of the cause before *Coleridge J.*, at the *Liverpool* Spring assizes, 1838, it was proved that the company was in possession of real estate; but no title deeds to the estate were produced; nor was it shewn what was the nature of the property belonging to the company, or the extent of their interest therein. The jury found a verdict for the plaintiff on both issues, subject to a motion to enter a verdict for the defendant. In the following *Easter* term *Alexander* obtained a rule nisi according to the leave reserved, citing, on the first plea, *Ex parte Vallance (a)*, and, on the second plea, *Ex parte The Vauxhall Bridge Company (b)*, and *Ex parte Horne (c)*.

Cresswell and *Crompton* now shewed cause. As to the second issue, the shares are not an interest in land within the fourth section of the Statute of Frauds, 29 *Car. 2. c. 3.*; *Bradley v. Holdsworth (d)*, *Bligh v. Brent (e)*. It was not proved that the shareholders were at all in-

(a) 2 *Deacon*, B. C. 354.(c) 7 *B. & C.* 632.(e) 2 *Y. & Coll.* 268.(b) 1 *Glyn. & J.* 101.(d) 3 *M. & W.* 422.

interested in the land, or that the real property in the possession of the company was of a beneficial nature, or was in their possession at the time of the sale; nor was the nature of their interest shewn. [Upon this point counsel were stopped by the Court.] As to the first plea, there is an essential difference between the language of sect. 72 of the Bankrupt Act, 6 G. 4. c. 16., and of section 17 of the Statute of Frauds. The words of the former are "goods and *chattels*;" those of the latter are "goods, wares, and merchandizes." The word "chattel" is more comprehensive than any word used in the Statute of Frauds, and has been construed to include debts, bills, bonds, policies of insurance, and shares in a joint stock company, all of which pass to the assignees when in the possession, order, or disposition of the bankrupt; *Hornblower v. Proud* (a). Here no stock, goods, or tangible property passed to the plaintiff, but only a right to participate in the partnership profits, from whatever source those profits might be derived. A mere right of action is a chattel within the Bankrupt Act; but the merchandizes within the meaning of the Statute of Frauds must be such as are capable of part delivery. The owner of a share is not necessarily entitled to any of the real or personal estate or property of the company; or, if he is, the defendant has not proved it.

Alexander, contra. The defendant has no means of compelling the production of title deeds to shew the interest which the company, or the plaintiff as a shareholder, had in the real estate: but possession was shewn, which is, at all events, *prima* evidence of property; and the interest of the shareholders in such partnership

(a) 2 B. & Ald. 327.

property

1839.

HUMBLE
against
MITCHELL.

1839.

—
HUMBLE
against
MITCHELL

property is a necessary consequence, or probable inference. [Lord *Denman* C. J. Mere possession is not enough; you should have proved that the company was entitled to real property, and that the shareholders had an interest in it.] As to the first plea, there is no direct authority in point; but the language of the Bankrupt Act is not substantially different from that of the Statute of Frauds; and it has been frequently decided that shares in public companies are “goods and chattels” of which a bankrupt may be the reputed owner so as to vest them in the assignees. *Ex parte Burbridge* (a); *Ex parte Ord* (b); *Ex parte Vallance* (c). In *Hall v. Franklin* (d) it was held that a banking company is a trading company.

LORD DENMAN C. J. With respect to the question arising on the second plea, we have already disposed of it. The other point is whether the shares in this company are goods, wares, or merchandizes, within the meaning of sect. 17 of the Statute of Frauds. It appears that no case has been found directly in point: but it is contended that the decisions upon reputed ownership are applicable, and that there is no material distinction between the words used in the Statute of Frauds, and in the Bankrupt Act. I think that both the language and the intention of the two acts are distinguishable, and that the decisions upon the latter act cannot be reasonably extended to the Statute of Frauds. Shares in a joint stock company like this are mere choses in action, incapable of delivery, and not within the scope of the seventeenth section. A contract in writing was therefore unnecessary.

(a) 1 *Deacon*, B. C. 131.(b) 1 *Deacon*, B. C. 166.(c) 2 *Deacon*, B. C. 354.(d) 3 *M. & W.* 259.

PATTESON,

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

1839.

S.

Rule discharged. (a)

HUMBLE
against
MITCHELL.

(a) A question also arose as to the proper mode of estimating the damages in this action : but on this point the parties eventually agreed.

MERRY *against* CHAPMAN.

Thursday,
November 28th.

THE argument and decision on the motion for judgment non obstante veredicto in this case are reported, 10 *A. & E.* 524.

BROADBENT *against* LEDWARD.

Thursday,
November 28th.

DETINUE for pictures. Pleas 1. Non detinet. 2. That the pictures were not the pictures of the plaintiff.

In detinue, upon issue joined on a plea denying property in the plaintiff, it is no defence that there are other persons, co-tenants with the plaintiff, who are not joined in the action.

At the trial at the *Liverpool* Spring assizes, 1838, before *Coleridge* J., it appeared that the plaintiff was a trustee and member of a club, and as such member was proprietor of the pictures jointly with other members, who were not made co-plaintiffs in the action. The jury found a verdict for the plaintiff on both issues, subject to a motion to enter a verdict for the defendant on the second plea, if the Court should be of opinion that the nonjoinder was a defence under it. In the following term *Wightman* obtained a rule nisi accordingly.

Cresswell, *Alexander*, and *Tomlinson* now shewed cause. Detinue is essentially an action founded on tort; and

1839.

BROADBENT
against
LEDWARD.

and one of several parties injured may therefore sue alone, subject to a plea in abatement. That this is the law in trover is established by *Nelthorpe v. Dorrington* (a), *Addison v. Overend* (b), and *Sedgworth v. Overend* (c). [*Coleridge J.* Detinue and debt may be joined in one action (d); and the defendant might formerly have waged his law.] Those tests are not decisive, for detinue and trover may also be joined (e), and trial by law wager depended not on the form of action, for it would not lie in many cases of debt and other actions ex contractu, but on the nature of the transaction upon which the action was founded (g). The allegation of a bailment in the declaration is no proof that the action is upon a contract, for it is immaterial and mere inducement; *Bateman v. Elman* (h), *Gledstane v. Hewitt* (i). The new rules of pleading shew that the detention is the gist of the action; for they provide that the plea of non detinet shall have no other effect than to put it in issue; *H. 4. W. 4. Pleadings in particular Actions*, III. (k). *Mills v. Graham* (l) is to the same effect; and there the action was held to lie against an infant. In *Com. Dig. Pleader*, (E 10.), the nonjoinder of a co-tenant in detinue of charters is treated as matter for a plea in abatement only. If the plaintiff recover the goods in specie, the defendant will be in no danger of actions at the suit of the other tenants in common; for he

(a) 2 *Lev.* 113.(b) 6 *T. R.* 766,(c) 7 *T. R.* 279,(d) 2 *Wms. Saund.* 117. c. note (2) to *Coryton v. Lithby*.(e) But see *Kettle v. Bromsall, Willes*, 118.(g) See *Co. Lit.* 295. a.; *Mood v. The Mayor of London*, 2 *Salk*, 683.(h) *Cro. El.* 866.(i) 1 *C. & J.* 565.(k) 5 *B. & Ad. Appendix*, p. ix.(l) 1 *New Rep.* 140.

will

will then be in the same situation as if he had voluntarily delivered the property to the plaintiff, which would have been a clear defence; *F. N. B.* 138 G. n. (a) by *Hale*; and the plaintiff had a right to take possession without the assent of the rest of the joint owners; *Holiday v. Cammell* (a). If, instead of delivering up the goods in specie, the defendant pays damages, the case is then exactly parallel to that of trover. [*Coleridge J.* The judgment is to recover the goods or *their value*, and not damages only.] The form of judgment is satisfied, if the value of the plaintiff's share in the goods be recovered. The form of the issue is not repugnant to a recovery of the property by the plaintiff alone, for it is not the less his property because it also belongs to others. The reason why all the parties to a contract must be joined is to avoid a variance. [*Patteson J.* That is an untenable ground; for then it would be a variance if all persons, who ought to be co-defendants, were not joined.] At all events, there is no variance here, for no contract is relied on, and the issue is, in terms, proved. If, therefore, the nonjoinder be a defence, it should be pleaded either in abatement or in bar.

1839.

BROADBENT
against
LEDWARD.

Wightman, contra. Although detinue does, in some respects, resemble trover, and the detention is the gist of the action, there are other incidents which essentially distinguish the two forms of action. The process was different at common law, being by summons, as in debt or account, and not by attachment. That the plaintiff should be able to join counts in detinue and debt, and

(a) 1 T. R. 658.

1839.

BROADBENT
against
LEDWARD.

the defendant to wage his law, are further distinctions shewing that detinue is in the nature of debt. It is no test that the defendant might discharge himself by giving up the property to one of the co-tenants; for a debtor may do the same by paying one of his joint creditors, yet all must join in suing him. One of several joint owners may recover in trover, because no prejudice can thereby accrue to the rest; and, if there be any prejudice to the defendant, he can prevent it by a plea in abatement. But here each, if he sues separately, may, and must, recover the whole; and the jury cannot, as in trover or trespass, apportion the sum to be recovered by the plaintiff alone. The defendant has an option to deliver up the goods, or to pay the value; but how is this option to be exercised, if several may bring successive or concurrent actions for the entire property (a)? How is the defendant to make a partial delivery to each? [Lord *Denman* C. J. Has not the plaintiff a right to recover as against the defendant, who has no right at all?] Not in this form of action, in which the damages cannot be assessed according to the plaintiff's separate interest. It is a proceeding in rem, in which the persons really entitled to the property should be made plaintiffs. The plaintiff has not *such* a property as is necessary to support this action, and has no right to throw on the defendant the difficulty of finding out who are the plaintiff's co-tenants.

Lord DENMAN C. J. It is always unpleasant to defeat justice by adherence to technical and arbitrary rules. In suing upon contracts the rule has certainly

(a) See *Pye v. Cooke*, *Moo*, 864, 865.

been

been that all the contracting parties must be joined as co-plaintiffs, and advantage may be taken of the non-joinder without a plea in abatement; but, as no express authority has been shewn by Mr. *Wightman* for the application of this rule to the action of detinue, we shall decide against the defendant. If any inconvenient consequence arises to the defendant from detaining the property of joint-owners, it might have been avoided by giving it up to any one of them.

1839.

—
BROADBENT
against
LEDWARD.

PATTERSON J. The rule as to the consequence of the non-joinder of parties as plaintiffs in actions founded upon contract is not satisfactory in principle, and ought not to be extended.

WILLIAMS and COLERIDGE Js. concurred.

S.

Rule discharged.

ROBINS and Others *against* MAY.

Friday,
November 29th.

ASSUMPSIT on a promissory note made by defendant, whereby he promised, at twelve months after date, to pay to plaintiffs 500*l.*, to be held by them as collateral security for any monies then owing to them by *J. Malachy*, which they might be unable to recover on realizing the securities they then held, and others which might be placed in their hands by him.

Plea; that the instrument mentioned in the declaration was and is the following; that is to say,

An instrument in the following form:
"At twelve months after date, I promise to pay Messrs. *R. and Co.* 500*l.*, to be held by them as collateral security for any monies now owing to them by *J. M.*, which they may be unable to recover on

realizing the securities they now hold, and others which may be placed in their hands by him;" is not a promissory note, and cannot be declared on as such.

1839.

Devonport, 22d June 1837.

 ROYNS
 against
 MAY.

At twelve months after date, I promise to pay Messrs. *Robins, Foster, and Co.* 500*L.*, to be held by them as collateral security for any monies now owing to them by Mr. *J. Malachy*, which they may be unable to recover on realizing the securities they now hold, and others which may be placed in their hands by him.

£500.

Thomas May.

That the said instrument was made and given by defendant to plaintiffs as, and by way of, collateral security and guarantee to plaintiffs for the payment of monies then due from the said *J. M.* to plaintiffs, and which plaintiffs might be unable to recover on realizing the securities of *J. M.* which they then held, and any other securities which thereafter might be placed in their hands by *J. M.*, and for, and upon, no other account or purpose. Wherefore the said instrument and promise were made and given without any value or consideration. Verification.

Demurrer, alleging special grounds of objection to the plea. In the margin of the demurrer-book the defendant objected to the declaration, for that the instrument stated in it was not a promissory note, but an agreement.

Sir *W. W. Follett*, for the plaintiff. The note is not payable on any contingency, but at a fixed time, viz. twelve months after date, and is therefore not within any of the cases collected in *Byles on Bills* (a), where it has been uncertain whether the money would ever become payable at all. There is some ambiguity on the

(a) Page 52. 3d ed.

face of the note, whether it was intended that the money, or the note, is to be held as the security. If the money is meant, there can be no question of the validity of the note, for it is then meant to be enforced at all events. If the note itself is intended, still the payment can be enforced at the end of twelve months, provided the debt, due from *J. M.* to the plaintiff, be not in the mean time satisfied. At the end of that time, when this action was brought, the plaintiffs became entitled to recover absolutely; and their right of action can be defeated only by shewing a previous payment by *J. M.*, which cannot be presumed on the present record. It is enough if the note is made absolutely payable at a time certain, and the insertion of other matter collateral to the note will not vitiate it; *Ellis v. Mason (a)*. Notes of this kind are often given in the usual course of business between bankers and their customers, and are agreeable to the custom of merchants.

1839.

 ROBINSON
 against
 MAY.

Kelly, contra. If the note be good at all, it must be as an agreement, and not as a note within the stat. 3 & 4 Ann. c. 9.; and the plaintiffs should have declared on it as such agreement with proper averments of consideration to support it, and of non-payment by *Malachy*. It appears, on the face of it, to have been given as a security only; and material words, tending to qualify the contract, or to render the ultimate liability of the defendant uncertain, cannot be rejected; *Ayrey v. Fearnside (b)*. It is immaterial whether the money or the note is to be held as the security; for in either case the instrument becomes worthless by the intermediate pay-

(a) 7 Dowl. P. C. 598.

(b) 4 M. & W. 168.

1839.

ROBINS
against
MAT.

ment of the monies *then owing*. (He was then stopped by the Court.)

Sir *W. W. Follett*, in reply. Suppose, instead of twelve months after date, the note had been payable on demand, can it be doubted that it might then have been enforced immediately, and would therefore have been a valid note? In principle it is the same whether it be made payable immediately, or at a future fixed time.

LORD DENMAN C. J. The instrument is no promissory note, and cannot be declared on as such. It gives notice on the face of it, to all the world, that the promise is only a conditional one.

PATTESON J. The note is, in substance, a promise to pay, if another person named in it does not pay. If it had been indorsed before it was due, it would have been worthless in the hands of the indorsee.

WILLIAMS and COLERIDGE Js. concurred.

S.

Judgment for the defendant.

Friday,
November 29th.

WALMESLEY and NELSTROP *against* COOPER.

A covenant by *A.* not to sue defendant for any debt due from him to *A.* cannot be pleaded as a release in bar of an action by *A.* and *B.* for a debt due to them jointly.

DEBT for goods sold and delivered, and on an account stated.

Plea; that, after defendant became indebted to plaintiffs, and before the commencement of the suit, the plaintiff, *Walmesley*, by a certain indenture, released to defendant the several debts in the declaration mentioned,

tioned, and all damages sustained by him by reason of the detention thereof and otherwise, and all causes of action, claims, and demands in respect of the same. Verification.

1839.

WALMESLEY
against
COOPER.

Replication; that the indenture mentioned in the plea was and is an indenture purporting to be made 11th *July* 1837, between defendant of the first part, *T. Tattersall* and *C. Watts*, of the second part, and several creditors of the defendant of the third part, and is as follows: [The replication then set out at length a deed by which the defendant assigned his estate and effects to *Tattersall* and *Watts*, upon trust to sell them and to divide the proceeds rateably according to their debts among the parties to the deed of the third part, who should execute it on or before 1st *August* 1837; and the several parties whose hands and seals were subscribed and set thereto, of the third part, for themselves severally did thereby covenant with the defendant that they, or any of them, should not, nor would, at any time thereafter, prosecute, arrest, molest, interrupt, or disturb the defendant, or attach the goods which he might thereafter acquire, for any debt then owing to them respectively from the defendant, but would accept such dividend or composition as should arise from the estate assigned, in full satisfaction of their respective demands.] That the plaintiff *Walmesley*, being one of the creditors, subscribed and executed the deed as one of the parties of the third part after the said 1st *August*, and not before; and by reason thereof no dividend had been, or would become, due or payable to the plaintiffs, or to either of them, in respect of the said assignment; nor have the plaintiffs, or either of them, received any dividend in

1839.

WALMESLEY
against
COOPER.

respect of their debt ; and the said indenture had been and was of no avail to the plaintiffs, or either of them. Verification.

Rejoinder ; that, before and at the time when the plaintiff *Walmesley* executed the indenture, the two plaintiffs were creditors of the defendant for the monies mentioned in the declaration, and plaintiff *Walmesley* then had notice of the contents of the indenture, and of the clause therein as to the 1st *August*, and of all other provisions therein. Verification.

Demurrer and joinder.

The demurrer was argued in this vacation, *November 29th (a)*.

Tomlinson for the plaintiff. The only question is, whether the covenant in the indenture operates as a release of the joint debt of the plaintiffs. The recital of the deed and its context shew that the operation was only to be co-extensive with the consideration, and, therefore, as the plaintiffs received no advantage from the trust (the plaintiff *Walmesley* not having executed before 1st *August*, and the plaintiff *Nelstrop* not having executed at all), the release must be restrained so as not to apply to a debt due to the plaintiffs jointly. [As the judgment did not proceed on this ground, the rest of this head of argument is omitted.] Assuming the covenant in the indenture to apply to joint debts, it is the subject of a cross action, and is not pleadable as a release against both the plaintiffs. This construction will throw the loss where it ought to fall, viz. on *Walmesley* alone, and is agreeable to principle and authority. The principle is that, where a

(a) Before Lord Denman C. J., Patterson, Williams, and Coleridge Js.

recovery by the plaintiff against the defendant would necessarily give the defendant a right of action against the plaintiff to recover back the fruits of the first judgment, there, to avoid circuitry of action, a covenant not to sue may be pleaded as a release. But here the covenantor and covenantee are not the only parties interested. The plaintiff *Nelstrop* is not shewn to be a party to the covenant, or privy to it. The doctrine, that a covenant not to sue may operate as a release, has been adopted by the courts slowly, and with many qualifications. *Lacy v. Kinaston* (a) is an early authority in restraint of the rule. In *Dean v. Newhall* (b) it was held that the obligee, who had covenanted not to sue one of two joint and several obligors, might sue the other, although a release to one would have been a bar as to both. In *Hutton v. Eyre* (c) the same point was decided where the debt was a joint one, and not joint and several; and *Gibbs* C. J. states in general terms that "the rule, that a covenant not to sue operates as a release, applies only to cases where the covenantor and covenantee are single."

1839.

WALMESLEY
against
COOPER.

Wightman, contra. As a release by one of two joint debtors is a discharge of the whole action, so where the right of action is gone as to one, whether by covenant or otherwise, it is gone as to both. Unless this be the proper construction, there will be circuitry; for, if *Nelstrop* died, *Walmesley* would be entitled to sue alone by survivorship for the joint debt. It cannot be denied by the plaintiffs that the covenant would then be operative as a release; yet the principle is the same. [*Pat-*

(a) 1 *Ld. Ray.* 688. *S. C.* 2 *Salk.* 575.; 3 *Salk.* 298.(b) 8 *T. R.* 168.(c) 6 *Taunt.* 289.

1839.
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 WALMESLEY
 against
 COOPER.

teson J. Suppose *Walmesley* dead, and *Nelstrop* sues as survivor, is there any circuitry?] The release operates on the debt, and not merely on the debtor. Whatever is a bar to one must be a defence against both, where entirety of interest obliges both to join. In *Hutton v. Eyre (a)* the Court relied in some degree upon the apparent intention of the parties *not* to release the co-contractor; and intention may certainly restrain the effect of an express release. In all the cases cited, except *Hutton v. Eyre (a)*, the plaintiff might have sued alone before the release. There is nothing that should, on principle, prevent a covenant like this from having the effect of a release; for, if the law gives a partner the power to extinguish a joint debt, it seems of little importance whether it be by adopting the form of a release, or of an absolute covenant. One is a release in terms; the other by construction of law. That a discharge of one obligor by construction, of law, as by making him an executor of the obligee, will be a discharge of both, was decided in *Cheetham v. Ward (b)*, and was recognised in *Nicholson v. Revill (c)*. [*Patteson J.* The covenant in the deed is not even a covenant with respect to joint debts; nor does it profess to be a covenant by *Walmesley* for himself and partner.] The covenant is general, and applicable to all debts for which the plaintiff *Walmesley* might sue; nor does it appear that there were any other than joint debts due to him. [*Patteson J.* I doubt whether a release by *A.* of a debt due to *him* would release debts due to him and *B.* jointly.] It would, if there were none but joint debts.

(a) 6 Taunt. 289. 296.

(b) 1 B. & P. 630.

(c) 4 A. & E. 675.

Tomlinson, in reply. *Hutton v. Eyre* (a) has not been answered or explained. A covenant not to sue is not to be put on the footing of a release in law; but the operation of a release is given to it in certain cases and for a certain purpose, that is, to avoid the expense and needless form of cross actions. The instance put, of a constructive release by making the debtor an executor, depends on the technical rule that a party cannot be both plaintiff and defendant at common law: where that rule does not obtain, as in equity, no such operation is permitted.

1839.

WALMESLEY
against
COOPER.

Cur. adv. vult.

On the following day (30th *November*) the judgment of the Court was delivered by,

LORD DENMAN C. J. This was an action by two for a joint debt. Plea, that *Walmesley*, one of the plaintiffs, by deed of composition, released the defendant from the debt. The replication sets out the deed which contains no release in terms, but a covenant by the plaintiff not to sue the defendant for any debt due from the defendant to him. Neither the amount nor nature of the debt from the defendant to *Walmesley*, to which the covenant applied, appears on the deed, nor in the schedule attached to it.

The defendant argued that this covenant amounted to a release of the joint debt, which was the subject matter therein referred to. But a covenant not to sue has been held equivalent to a release on no other principle than that of avoiding circuity of action, *i.e.* the scandal

(a) 6 *Taunt.* 289.

and

1839.

WALMESLEY
against
COOPER.

and absurdity of allowing *A.* to recover against *B.*, in one action, the identical sum which *B.* has a right to recover in another against *A.* The law, when it clearly detects the possibility of such a waste of the suitor's money and its own process, as well as of the public time, will interpose to prevent its happening. But, if the parties thus opposed in interest are not the same, the principle cannot apply. If one of two plaintiffs covenants not to sue for a joint debt, he may be liable for a breach of that covenant if both afterwards sue. But, if he is then sued by the debtor for breach of covenant, he alone must answer for it. The two will have recovered according to defendant's obligation to them; but that one only will be compellable to refund who has entered into a counter obligation with their debtor not to sue him. The subject-matter of the two actions may be called the same, being the same in amount, in one sense; but the parties are different; the partnership losing nothing by the separate contract of one of the partners, who, however, has made himself personally liable by not performing it.

This appears not only to be a fair deduction from the principle, but also strictly conformable with all the decisions that were brought before us.

We think that the joint debt is not released by the deed set forth, and that the plaintiffs are entitled to our judgment.

S.

Judgment for the plaintiffs.

1839.

IN THE EXCHEQUER CHAMBER.

PARNABY and Others *against* The Company of Proprietors of the LANCASTER Canal Company.

The Company of Proprietors of the LANCASTER Canal Company *against* PARNABY and Others.

(Error from the Queen's Bench).

CASE. The declaration stated that by an act of parliament (32 G. 3. c. 101.), intituled, "An act for making and maintaining a navigable canal from *Kirkby Kendal*, in the county of *Westmoreland*, to *West Houghton*, in the county palatine of *Lancaster*, and also a navigable branch from the said intended canal, at" &c., "to" &c., "and also another navigable branch from" &c. "to" &c., it was enacted (a) that the persons therein mentioned were, and should be, united into a company for the carrying on, completing, and maintaining the said navigable canal and branches pass-

having care of it should not without loss of time weigh it up, it was, by the statute, to be lawful for the company to weigh it up, and detain it till payment of expenses: that the company completed the canal, and took tolls on it; that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that, although the company could, and ought to, have requested the owner &c. to weigh it up, and, if that was not done without loss of time, could, and ought to, have weighed it up, and, in the meantime, have caused a light or signal to be placed to enable boats to avoid it, yet the company did not cause the owner &c. to weigh it up, nor themselves weigh it up, nor place a light or signal: whereby plaintiff's boat, navigating the canal, ran foul of the sunken boat and was damaged.

Held, by the Court of Exchequer Chamber (affirming the judgment of the Court of Q. B.), that the declaration disclosed a sufficient duty and breach.

By the Court of Exchequer Chamber: such duty was not created by the clause enabling the company to weigh the boat, but arose upon a common law principle that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure, the want of which reasonable care might be collected from the declaration, although the complaint was ostensibly founded on the statute.

(a) Sect. 1. The provisoes, as set out in the declaration, contained some immaterial variations from the statute.

able

1839.

PARNAVY
against
The
LANCASTER
Canal
Company.

able for boats, barges, and other vessels, according to the rules, orders, and directions thereafter expressed, and should, for that purpose, be one body politic and corporate, by the name of the Company of proprietors of the *Lancaster* canal navigation as therein mentioned: and the said company, and their successors, were thereby authorised and empowered to make and complete a canal, to be called *The Lancaster Canal*, and to be navigable and passable for boats, barges, or other vessels, from, at, or near *Kirkby Kendal* aforesaid, to and through the several parishes therein mentioned, and also one branch &c.; and also one other branch &c.; and to do all matters and things which they should think convenient and necessary for the making, effecting, extending, preserving, improving, completing, and easy using of the said intended canal and other works, as therein mentioned: and (a) that it should be lawful for the said company, and their successors, from time to time, and at all times thereafter, to ask, demand, take, and recover, to and for their own proper use and behoof, the rates and duties in the said act in that behalf mentioned: and (b) that all persons whosoever should have free liberty to navigate upon the said canal, sluices, trenches, or passages, with any boats or vessels not exceeding such lengths and breadths as the locks would commodiously permit, upon payment of such rates and duties as should be demanded by the said company and their successors, not exceeding the rates and duties thereinbefore mentioned: and (c) that, if any boat or vessel should be placed or lie abreast or athwart in any part of the said canal or branches, &c., not being

(a) Sect. 84.

(b) Sect. 91.

(c) Sect. 110.

moored

moored at both ends, or if any person or persons navigating any boat or vessel should wilfully obstruct the navigation of the said canal by means of such boat or vessel, and the person having the care of such respective boat or vessel should not immediately, upon request made, moor the same at both ends, or remove, stop, or effectually secure the same, as the case should require, every person so offending should, for every such offence, forfeit a sum not exceeding &c., and also a like sum for every hour such neglect or obstruction should continue; and that it should be lawful for the agents or servants of the said company and their successors, or any of them, to cause any such boat or vessel to be unloaded, if necessary, and to be removed in such manner as should be proper for preventing such obstruction in the navigation, and to seize or detain such boat &c., and the loading &c., until the charges occasioned by such unloading and removal were paid; and that, if any boat or vessel should be sunk in the said canal or branches &c., and the owner or owners, or person or persons having the care of such boat or vessel, should not, without loss of time, weigh or draw up the same, it should be lawful for the agents or servants of the said company, or their successors, or any of them, to cause such boat or vessel to be weighed or drawn up, and to detain and keep the same till payment were made of all the expences thereby necessarily occasioned.

The count then stated that, before and at the time of the committing of the grievances &c., the canal and branches had been completed, and the company had been and were used and accustomed to take and receive rates and duties in respect of the passing of boats and vessels in and along the said canal and branches; and the

1839.

PARNARY
against
The
LANCASTER
Canal
Company.

1839.

PARNAVY
against
The
LANCASTER
Canal
Company.

the plaintiffs then were the owners of a certain fly boat of great value, towit &c., and of such a length as the said locks would commodiously permit, wherewith they had been used and accustomed to pass and repass in and along the said canal and branches, with goods, &c., as common carriers, paying to the said company such rates and duties in that behalf as were required by the said company, not exceeding the amounts in that behalf by the said act directed; and in and on board of which fly boat, at the time of the committing &c., there were divers goods, &c., of great value, towit &c., of and belonging to &c., towit (naming several owners), and which were then in the custody, and under the care and in the possession, of plaintiffs, as carriers, and for the purpose of being safely carried by them in and on board of the said boat, for reward &c.: that heretofore, towit 1st *March* 1836, a certain boat sunk in one of the said branches of the said canal, towit (describing the branch), and lay athwart the same, and was moored only at one end, and obstructed the navigation of the said canal in the said branch thereof, so that boats and vessels passing in the daytime could not, without difficulty, avoid or pass such obstruction, and boats passing at night and in the dark would be in great danger of running foul of, and striking against, the same: and neither the owner or owners, nor persons having the care, of the said boat so sunk, did or would without loss of time weigh or draw up the same, or remove the said obstruction, but wholly neglected &c., of all which premises the company, long before the happening of the accident and accruing of the damage after mentioned, had notice; whereupon it then became and was the duty of the company, by their agents or servants in that behalf, within

within a reasonable time after such notice, to cause the boat so sunk to be weighed or drawn up, and the said obstruction to be removed: yet the company, by their servants, did not nor would do or perform their duty in the premises, but wholly neglected the same, in this, towit that, although a reasonable time in that behalf elapsed long before the accruing of the damage after mentioned, and although the said company could, and might, and ought to, have called on and requested the owner or owners, or person or persons having the care, of the said last-mentioned boat, to moor the same at both ends, or to remove, stop, or effectually secure, and to weigh and draw up, the same, and, if the same had not thereupon been done without loss of time, could, and might, and ought to, have caused such boat to be weighed and drawn up before the time when the said damage accrued as afore-mentioned, and could, and might, and ought, in the meantime and until such obstruction should be removed, to have caused some light or other signal to be so placed as to enable persons steering or guiding boats or vessels in that direction in the night time to avoid the same: yet the said company did not, nor would, cause the owner &c., or person &c., to be requested to moor &c., or to remove &c., nor to weigh &c., nor did nor would cause such boat to be unloaded or removed in such manner as was proper for preventing such obstruction in the navigation, nor to be weighed or drawn up, nor did nor would cause any light or signal to be set up &c.; by means whereof the said fly boat of the plaintiffs, having on board thereof the said goods &c., and lawfully and rightfully passing in and along the said branch &c., and the persons attending on

1839.

PARNABY
against
The
LANCASTER
 Canal
 Company.

1839.

PARNABY
against
The
LANCASTER
Canal
Company.

and on board of the said fly boat and having the direction thereof, and being the servants of the plaintiffs in that behalf, being unable to see the said obstruction, on the night of the said 1st *March* 1836, ran foul of, and struck against, the end of the said boat so sunk &c., and by means thereof (averment that the boat was broken, damaged, and spoiled, and the goods spoiled, damaged, and rendered of no use, insomuch that, by reason of the premises, the plaintiffs were put to, and did necessarily incur, great expense, amounting to &c., in and about the unloading, raising, &c., their said fly boat, &c.: with special damage for the expense of hiring another boat, loss by keep of horses, and wages, and deprivation of profits, and by having to reship the goods, and satisfy the owners for the damage done).

Plea, Not guilty.

On the trial before *Coleridge J.*, at the *Liverpool* Summer assizes, 1836, it was objected that, admitting the facts as laid in the declaration, no breach of duty was shewn. The learned Judge declined to stop the case, but reserved leave to move for a nonsuit. Verdict for the plaintiffs. In *Michaelmas* term, 1836, *Cresswell* obtained a rule nisi for a nonsuit. In *Easter* term, 1838 (a),

Alexander, Wightman, G. Henderson, and Tomlinson shewed cause; and *Cresswell, Armstrong, and L. Peel* supported the rule. (It is considered sufficient to refer to the arguments in the court of error).

Cur. adv. vult.

(a) *Friday, May 4th, 1838.* Before Lord Denman C. J., *Patteson* and *Coleridge Js.*

Lord

Lord DENMAN C. J., in the following *Trinity* term (June 6th 1838), delivered the judgment of this Court.

This was an action on the case for negligence in leaving a sunken barge in the defendants' canal, which the plaintiffs' vessel ran against, and was thereby sunk. The declaration set forth portions of the act, by which the defendants were empowered to make a canal passable for all boats, and to receive tolls for their passage, and to raise such vessels as might be sunk in their canal, if the owners should omit to do so for twenty four hours (a): it then alleged a duty in the defendants to keep the canal clear and safe for navigation, and stated that the plaintiffs' vessel was navigating there, using the canal, and paying toll to the defendants: and, lastly, described the injury sustained from the vessel after the twenty four hours. The only plea was Not guilty.

On the trial before my brother *Coleridge*, the jury found a verdict for the plaintiffs to the full extent of their loss: but the defendants obtained a rule for entering a nonsuit according to leave reserved: and we have heard that rule fully argued.

We do not feel the smallest doubt that this action may be maintained. The only one, of the numerous cases cited, that appeared to point the other way, is *Harris v. Baker* (b), where trustees of a road were held not liable to an action for a personal injury arising from plaintiff's falling in the night time over a heap of scrapings placed on the road side by defendant, who placed no light to give notice of the obstruction. But that case may be distinguished, as the action was against public

1839.

PAERNABY
against
The
LANCASTER
Canal
Company.

(a) The expression in the statute and declaration is "without loss of time."

(b) 4 M. & S. 27.

1839.

—
PARNABY
against
The
LANCASTER
Canal
Company.

officers who derived no benefit from the road. The present defendants, on the contrary, invite the whole public to navigate on their canal, in consideration of the tolls paid. They have lawful power to make the canal in all respects fit for navigation, and particularly to remove the kind of obstruction by which the plaintiff suffered. It is the same, in principle, as if they announced the carrying on of a business at premises accessible only by a certain road over their land, which was open to the public for that purpose, but which they only, and not the public, had a right to repair, and they left that road in so bad a state that a person's leg was broken when he came to transact business with them there. A more familiar example, and not of very rare occurrence, is that of a shopkeeper who leaves a trap-door open in his shop, and causes a customer to fall down and suffer injury.

It is, therefore, needless to enter upon the other point made, as to the effect of the plea of Not guilty (a).

Rule discharged.

The plaintiffs having entered up judgment, the defendants brought error in the Exchequer Chamber. The case was argued last *Trinity* vacation (*Tuesday, June 18th, 1839*), before *Tindal C. J., Bosanquet, Vaughan, and Erskine Js., and Parke, Gurney, and Maule Bs.*

L. Peel for the plaintiffs in error (the defendants below). The record discloses no cause of action. Neither by the statute, nor by the common law, is the duty, the breach of which is complained of, imposed on the company. But, as the declaration is framed, the plaintiffs

(a) See post, p. 239.

below

below cannot insist on the common law liability. The duty must be specifically alleged, and a breach of that duty shewn. Now here the duty specifically alleged is that created by the statute.

The language of stat. 32 G. 3. c. 101., set forth in the declaration from sect. 110, is, that it shall "be lawful" for the agents, &c., of the company to cause a vessel to be removed which obstructs the navigation. That is permissive, not imperative. Permissive words are sometimes construed as imperative; but that is only where the subject-matter shews that the common import of the words is not to be adhered to. In 2 *Dwarris on Statutes*, 712, it is said: "Words of permission shall in certain cases be obligatory. Where a statute directs the doing of a thing for the sake of justice, the word *may* means the same as the word *shall*. The stat. 23 H. 6. c. 10. (a), says that the sheriff, &c. may take bail; but the construction has been, that he shall be bound to bail; so, if a statute says, that a thing *may* be done which is for the public benefit, it shall be construed that it must be done. Exception was taken to an indictment, (upon the stat. 14 C. 2. c. 12.) against churchwardens and overseers, for not having made a rate to reimburse a constable, and it was urged, that the statute only puts it in their power, by the word *may* (b), to make such a rate, but does not require the doing it as a duty, for the omission of which they are punishable. The exception was not allowed; and the Court held that an indictment lies against them, if they refuse

1839.

The
LANCASTER
Canal
Company
against
PARNANT.

(a) C. 9. in *Ruffhead's statutes*; but the expression in the statute is "lesserount hors du prison" &c., "sur resonable suerte."

(b) The words of stat. 13 & 14 C. 2. c. 12. s. 18., are "shall hereby have power and authority to make an indifferent rate," &c.

1839.

The
LANCASTER
Canal
Company
against
PARNABY.

it" (a). In each of these cases it is clear that to hold the statutes merely permissive would leave it open to the caprice of the officers to give or deny justice. The words "shall and may" are sometimes imperative, because the word "may" does not necessarily qualify the word "shall." But here the words are only, it shall "be lawful." [*Bosanquet J.* referred to *Allnutt v. Inglis* (b).] In other sections of the act, duties are imposed on the company; but, in those instances, words of obligation are used (c). Nor is there any necessity for treating the words as compulsory, since any party having occasion to use the canal may, as in the case of a public highway, remove the obstruction. There is not even any distinct enactment requiring the company to complete the canal itself in the first instance (d). But, as to the particular act which the company are now sued for not doing, sect. 110 gives no power which the company would not have by common law, except that of detaining the boat till payment of expences. Now no

(a) The author cites *Rex v. Commissioners of the Flockwold Inclosure*, 2 Chitt. R. 251.; *Rex v. Barlow*, 2 Salk. 609.; *Backwell's Case*, 1 Vern. 152., where see note (1) to p. 153. (3d ed.). *Rex v. The Bailiffs and Corporation of Eye*, 1 B. & C. 85., and *Rex v. Broderip*, 5 B. & C. 239., were cited in the argument below.

(b) 12 East, 527.

(c) On this point he referred to sect. 94, which enacts that, in certain cases, the company "shall, at their own costs, set out and provide" watering places for cattle, "and shall supply" them with water; sect. 95, which enacts that the company "shall of their own costs, within three calendar months" &c., divide and separate, and keep &c., the towing path in certain parts, with a sufficient post &c., and maintain &c.; sect. 96, which enacts that the company "shall be liable to be indicted at common law for not making stone or brick bridges," as therein described; and sect. 97, which contains a similar enactment to compel the company to maintain, &c., the bridges.

(d) See *Regina v. The Eastern Counties Railway Company*, 10 A. & E. 531.

statute

statute can be understood to prescribe a positive obligation by merely granting powers which existed at common law. The argument for the plaintiffs, if valid, would shew that the company are indictable for this omission. In *Thicknesse v. The Lancaster Canal Company* (a) it was contended that the powers of the company were, by implication, to cease if not executed within a reasonable time. The Court refused to adopt this implication: but the doctrine now contended for by the plaintiffs, if correct, would have supplied a conclusive argument in that case, namely, that the powers could not cease, inasmuch as the act was compulsory on the company, and they could not abandon their rights and liabilities; but no such argument was suggested by the court or counsel. Cases for the purpose of shewing that the powers of such companies can be exercised only when the companies perform their duties were cited in *Lee v. Milner* (b), especially *Blakemore v. The Glamorganshire Canal Navigation* (c), which is the principal authority for the doctrine that companies, by accepting powers, enter into a contract with the public. But the cases of this class apply only where the company are proceeding to exercise their powers, and a question has arisen whether they can do so without performing their duties. Here the question does not arise upon an act which the company claim to perform (d). The boat which had sunk did not belong to them, nor did they bring it to the canal. No power is given them to examine as to the soundness of the boats which frequent

1839.

The
LANCASTER
Canal
Company
against
PARNAST.

(a) 4 M. & W. 472.

(b) 2 M. & W. 824.

(c) 1 Mylne & Keen, 154.

(d) On this distinction *Umphelby v. M'Lean*, 1 B. & Ald. 42., and *Blakemore v. Glamorganshire Canal Company*, 3 Y. & J. 60., were cited in the argument below.

1839.

—
The
LANCASTER
Canal
Company
against
PARNABY.

the canal, or to provide otherwise against accidents attending their use. But, indeed, if the possession of a power made the company liable to action for not exercising it, there would be no limit to the application of the principle: they might have been sued if they had not begun constructing the canal as soon as the act passed. It will perhaps be said that, as the company have taken the tolls which the act empowers them to demand, they are, reciprocally, liable to do all that they have power to do for the public. But such an argument would apply to the trustees of a turnpike road, who might as well be held liable to an action for not repairing the road (*a*). [*Bosanquet J.* The company take the tolls for their own benefit.] The company, in that respect, stand in the same position as parties who advance money to turnpike trusts on the security of the tolls. There is no real difference, in this respect, between the company and the parties advancing money to them on the security of the navigation (*b*): therefore the distinction taken in the judgment below between the present case and *Harris v. Baker* (*c*) cannot be maintained. Where the charge is that any one has used powers given him so as to injure another, the question is very different from that which arises when it is contended that the party, in consequence of being entrusted with such powers, is bound to perform a positive duty to another. *Lea-*

(*a*) *Res v. The Commissioners of Llandilo Roads*, 2 T. R. 292.; *Res v. Pappineau*, 2 Str. 686.; were cited in the argument below.

(*b*) Sect. 66 of stat. 32 G. 3. c. 101. empowers the company to raise 200,000*l.* by mortgaging the undertaking, and to assign the "navigation and undertaking, and the tolls, rates, and duties," as a security.

(*c*) 4 M. & S. 27. *Bush v. Steinman*, 1 B. & P. 404.; *Flower v. Adam*, 2 Taunt. 314.; *Res v. Watts*, 2 Esp. 675.; were cited in the argument below.

der

der v. Moxton (a) is a case of the former kind: there parties acting under the direction of commissioners of pavement were held liable for so raising the pavement as to inconvenience the plaintiff, the powers of the commissioners having been exceeded. That case seems not to have been approved of by Lord *Kenyon* in *Governor, &c. of Cast Plate Manufacturers v. Meredith* (b); but it is upheld in principle by *Jones v. Bird* (c), and explained in *Boulton v. Crowther* (d). *Harris v. Baker* (e) is a case of the latter sort; the decision there cannot be explained upon the principle laid down in the judgment below; and that case is the stronger because there the defendants were *required* to light the road.

But, even if the company were liable for not maintaining the canal in a state proper for navigation, it would not follow that they are bound to remove all obstructions created by others. The duty, as suggested in the declaration, would extend to every possible case in which a boat could be sunk, whether by design, negligence, tempest, &c.: and even knowledge by the defendants need not be proved; for it would not be a defence to an indictment for non-repair of a road that the party liable had no knowledge of the obstruction. Indeed, the duty here laid goes still farther than the liability to repair a road; for a party liable to repair is still not bound to remove an obstruction created by others. The party sinking the boat, if he did it wilfully,

1839.

The
LANCASTER
Canal
Company
against
PARNABY.

(a) 3 *Wils.* 461.

(b) 4 *T. R.* 794. *Sutton v. Clarke*, 6 *Taunt.* 29., was cited in the argument below.

(c) 5 *B. & Ald.* 837.

(d) 2 *B. & C.* 703. See pp. 708, 709, 710.

(e) 4 *M. & S.* 27.

would

1839.

—
The
LANCASTER
Canal
Company
against
PARWATY.

would be liable to the party injured; but can these be concurrent remedies? The attempt is to create a legal obligation by shewing an imperfect moral one. The declaration also endeavours to engraft circumstances not pointed at by the statute: thus it complains that no signal was given or light shewn; but no such duty can be collected from the statute. In the judgment below, the Court stated that the defendants here invite the public to navigate; but they are compelled, by the statute, to permit the navigation. It might as well be said that the trustees of a turnpike road invite the public to use it. Then, if the statute does not impose the duty, is there any thing in the situation of the company which makes them insurers? The analogy suggested in the judgment below, of a trap-door left open by a shop-keeper, whose customer falls through it, fails. There the liability arises from the duty which every householder is under not to create a nuisance (a). In order to bring the illustration within the present case, it must be contended that a shopkeeper makes himself liable, by opening a shop, to repair the road which leads to the shop. [*Tindal* C.J. You must contend that he is not liable, though the road is his private property.] The company cannot exclude the public from the canal as an owner of land may from a private road. The case is not varied by the taking of tolls; the liability, if it exists, must be independent of the profit. It appears that the court below have founded the duty neither on the statute nor on the common law, but have applied a supposed common law principle to the re-

(a) *Res v. Trafford*, 1 B. & Ad. 874., and *Trafford v. The King*, 8 Bing. 204., S. C. 2 Cro. & J. 265., 2 Tyrwh. 201., were cited in the argument below.

lations created by the statute; and the distinction between a positive act of injury and an omission to protect is lost sight of.

1839.

The
LANCASTER
Canal
Company
against
PARNABY.

Alexander, for the defendants in error (the plaintiffs below). First, independently of the particular provisions of the statute, the company are liable, upon general principles of law, to make good the navigation of the canal while they exact payment of tolls for their own benefit. It is not necessary to consider whether an indictment would lie: the question of civil liability may be considered independently of criminal liability, because an injury is suffered peculiar to the party complaining; *Wilkes v. Hungerford Market Company* (a). Bodies like the defendants, or individuals, are liable for mischief produced by the improper execution of powers intrusted to them by the legislature; *Leader v. Moxton* (b), *Matthews v. West London Water Works Company* (c), *Weld v. The Gas Light Company* (d). Those, it is true, were cases of positive misfeasance. [Tindal C. J. Will not the common law principle be the same as to an injury like this, and one resulting from not keeping up the banks of the canal?] No distinction in principle can be pointed out. It is not disputed that some duties are cast upon the company besides those specified in the statute; but what duty can be more necessarily incidental to their powers than that of keeping the navigation unobstructed? In *Rose v. Miles* (e) it was held that a party who had obstructed the navigation of a public creek by mooring his barge improperly was liable

(a) 2 New Ca. 281.

(b) 3 Wils. 461.

(c) 3 Campb. 403.

(d) 1 Stark. N. P. C. 189.

(e) 4 M. & S. 101.

to

1839.

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The
LANCASTER
Canal
Company
against
PARKART.

to an action on the case at the suit of a party who was thereby compelled to carry his goods by a less convenient course; and Lord *Ellenborough* distinguishes the case from *Hubert v. Groves* (a), where the action was held not to lie, on the ground that in *Rose v. Miles* (b) the plaintiff had commenced his course, and was in the occupation, as it were, of the navigation. If a person in the employ of a railway company laid a log across the rail, the company would be liable to an action for the resulting damage; and the law must be the same wherever the removal of the obstruction lies peculiarly in the province of the party charged. *Rex v. The Severn and Wye Railway Company* (c), *Wilkes v. Hungerford Market Company* (d), *Cane v. Chapman* (e), establish this principle. And the cases cited shew that the company are not protected by the fact that they are, in some sense, acting as public functionaries. [*Tindal* C. J. It must be as if the party had made the canal through his own land.]

Next, the statute, at any rate, imposes the liability. Sect. 110 confers on the company powers to remove obstructions, evidently with the intention that they should do so; and a penalty is imposed on the party obstructing. Sect. 111 imposes penalties for other obstructions (g): and sect. 124 (h) applies the penalties to the use of the

(a) 1 *Esp.* 148.(b) 4 *M. & S.* 101.(c) 2 *B. & Ald.* 646.(d) 2 *New Ca.* 281.(e) 5 *A. & E.* 647.

(g) Sect. 111 enacts that, if any person load timber in the canal so as to lie over the sides of the boat, or overload, so as to obstruct the passage, then, if the owner, or person having care of the boat, do not, on notice, haul the boat into proper places for boats to pass each other in, or if any person shall float timber so as to obstruct the passage, such owner or person shall forfeit not exceeding 5*l.* to the company.

(h) By sect. 124, all fines inflicted by the act, of which the application is not particularly directed, shall be applied and disposed of for the use of the navigation.

navigation.

navigation. [*Maule* B. Do you say the company are bound to do all that sect. 110 empowers them to do? Are they compelled to weigh up the boat and to detain it for payment of expences? Might they not remove the obstruction in any other way, though not designated by the act?] The general principles upon which such acts are construed appear from *Blakemore v. The Glamorganshire Canal Navigation* (a), *Allnutt v. Inglis* (b), and the two cases of *Rex v. Cumberworth* (c), by which authorities it appears that the power creates the duty. In *Scales v. Pickering* (d) it was said that, if there be an ambiguity, "every presumption is to be made against the company and in favour of private property." *Stourbridge Canal Company v. Wheeley* (e) confirms both these principles. *Harris v. Baker* (g) was the case of defendants clothed only with a public trust, and possessing no private interest.

Objections have been made to the language in which the duty is described: but such objections should be raised by special demurrer. Here the verdict will supply whatever facts are necessary to shew the duty and breach.

L. Peel, in reply. If no duty at all be laid, and no facts be shewn raising a legal obligation, that is a defect which the finding of a jury cannot aid. The plaintiffs below could not be taken to have proved more than is expressly stated in the declaration, or necessarily implied from what is stated; note (1) to *Stennel v. Hogg* (h). The plea of Not guilty neither admits, nor puts in issue, that

(a) 1 *Mylne & Keen*, 154.

(b) 12 *East*, 527. *Rex v. Lindsey*, 14 *East*, 317., was cited in the argument below.

(c) 3 *B. & Ad.* 108.; 4 *A. & E.* 731. See *Rex v. Edge Lane*, 4 *A. & E.* 723.

(d) 4 *Bing.* 448. See p. 452.

(e) 2 *B. & Ad.* 792.

(g) 4 *M. & S.* 27.

(h) 1 *Wms. Saund.* 228 b.

the

1839.

The
LANCASTER
Canal
Company
against
PARNABY.

1839.
 ———
 The
 LANCASTER
 Canal
 Company
 against
 PARNABY.

the duty charged legally arises from the facts stated; nor could any plea do so; *Trower v. Chadwick* (a). No formal objection to the declaration could be now taken: but the objection is that it does not suggest any cause of action. The defendants below are entitled to confine the plaintiffs to the matter originally disclosed on the record as a cause of action; and the complaint is distinctly framed upon the statute. Besides, the declaration does not aver that the company had means of giving notice of the obstruction. [*Tindal* C. J. That, at least, the jury might find.] At any rate, no facts are stated in the inducement to raise even the alleged common law duty; the facts relied on are alleged only in the breach. The cases cited apply only to instances of misfeasance. In *Rex v. Severn and Wye Railway Company* (b) the company had taken up their own railway. To make that case analogous to the present, the complaint should have been of the act of a stranger; but, if that had been so, the decision would clearly have been the other way. And *Abbott* C. J. said that the mandamus could not go to compel the defendants to maintain their railway. Here, if the act of the owner of the barge which caused the obstruction was illegal, the company will recover against him, and there will be a multiplicity of actions. No argument can be drawn from public policy; the company, if liable on the grounds suggested, will suffer from a mischief which they have no power to prevent. The case of a railway being obstructed by a servant of the company has been put, but has no bearing on this question. The railway

(a) 3 *New Ca.* 334. *Cotton v. Browne*, 3 *A. & E.* 312., was cited in the argument below.

(b) 2 *B. & Ald.* 646.

company could not be sued for an obstruction wilfully caused by a stranger : but that is the present case.

Cur. adv. vult.

1839.

—
The
LANCASTER
Canal
Company
against
PARNABY.

TINDAL C. J., in this vacation (*December 2d*), delivered the judgment of the Court.

The question raised by the writ of error in this case, after a verdict on a plea of Not guilty, was, whether the declaration disclosed a cause of action against the canal company. It recited several clauses of stat. 32 G. 3. c. 101., by which the company were empowered to make and maintain a canal navigable by the public with boats and vessels on payment of tolls. One of those clauses enacted that it should be lawful for the agents or servants of the company, if any boat should be sunk in the canal, and the owners should not weigh or draw it up, to cause it to be weighed or drawn up, and to detain it till the payment of expenses. The declaration then proceeded to state that the canal was formed and completed, and that the company received tolls ; that the plaintiffs were navigating the canal with a fly boat ; that a boat was sunk in it, and obstructed the navigation, so that boats could pass with difficulty in the day, and at night were in great danger of striking against the sunken boat ; that the owners of the boat did not weigh or draw it up, of which the company had notice ; whereupon it was the duty of the company, within a reasonable time after such notice, to cause the boat to be weighed or drawn up, and the obstruction to be removed : and the breach assigned is that the company did not, within such reasonable time as aforesaid, cause the boat to be raised or drawn up, nor the obstruction removed, nor did nor would cause a light or other signal to be set up or placed, or notice to be given, so

1839.

—
The
LANCASTER
Canal
Company
against
FARNWAT.

as to warn persons steering or guiding boats in that direction of the said obstruction : by means of which, and by and through the neglect and default of the company in that behalf, and without any default in the plaintiffs, the fly boat of the plaintiffs, being rightfully passing along the canal, and the persons on board of it being unable to see the obstruction, in the night, ran foul of, and struck against, the boat which was so sunk : and, by reason thereof, the fly boat, with the goods on board, was damaged.

The principal objection in this case was, that the clause recited in the declaration, and which is therein stated to have cast a duty on the company to remove the obstruction caused by the sunken boat, was not obligatory, but was an enabling or a permissive clause only. And we are all of that opinion. Neither the clause recited, nor any thing in the act of parliament contained, imposes such a duty on the defendants below : and the allegation in the declaration, as to the duty of the company, seems to have been founded on a mistake as to the true meaning and effect of that clause.

But, admitting this to be so, the question then arises, whether, upon the facts stated in the declaration, another duty of a different kind was not imposed by the common law upon this company ; and whether a sufficient breach of that duty is not alleged. It is clear that the statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all, or, if improperly stated, may be altogether rejected. Omitting, therefore, as it appears to us, the improper and unfounded statement of duty in the declaration, the facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company :

pany: and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection, by which his customers suffer injury.

The declaration, it is true, contains no averment of such a duty, which it need not do, nor any allegation in express terms of the breach of such duty. But the question still is, whether the facts alleged do not necessarily imply that there was a breach of that duty. We have felt some doubt upon this point; but we think, on consideration, that in substance such breach of duty is sufficiently assigned.

It is averred that the company had notice of the obstruction by the sunken boat; that they did not, within such a reasonable time as aforesaid (that is within a reasonable time *after such notice*), either weigh up the boat, or remove the obstruction in any other way, or do that which, in the event of their choosing to do neither of those things, they certainly ought, if they had used reasonable care to prevent accidents, to have done, namely, either place a signal, or give some notice to those who were navigating in that part of the canal. The allegation that they neither removed the obstruction, nor gave actual or constructive notice of it, amounts to an allegation of a breach of their common

1839.

The
LANCASTER
Canal
Company
against
PARNANT.

1839.

The
LANCASTER
Canal
Company
against
FARNHAM.

law duty to take reasonable care to prevent mischief by the obstruction; and the allegation, that they did not do so within a reasonable time after notice, is equivalent to a statement that a reasonable time had elapsed to have enabled them to have either removed the obstruction or given such notice of it.

On this ground, we think that there is a good breach of a common law duty, and that the declaration may be supported, and, consequently, that the defendant in error is entitled to our judgment.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

NESBIT *against* CHARLES RISHTON.

Monday,
December 2d.

If tenant in a writ of right obtain judgment on demurrer to the count, the demandant not joining in demurrer, but making default, the judgment for the tenant ought not to be final, no issue being joined on the mise. A judgment, under such circumstances, barring the demandant as to the present action, is, so far, good; but, if it also ad-

judge that the tenant shall hold to him and his heirs quit of the demandant and his heirs for ever, that part is erroneous, and the judgment ought, so far, to be reversed.

So held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench.

CHARLES RISHTON brought a writ of right in the Court of Common Pleas of the County Palatine of Lancaster, demanding certain premises against *Anthony Nesbit*, who demurred specially to the count, praying judgment, and that the demandant might "be barred from having or maintaining his aforesaid action thereof against him &c." One of the causes assigned was that the demandant, claiming through *John Rishton* whom he alleged to have been second cousin and heir of *B. A.*, did not shew how *J. R.* was such cousin and heir. Demandant, instead of joining in demurrer, made default; and thereupon the Court gave final judgment for the tenant; "that the said *Charles Rishton*

and

an his pledges to prosecute be in mercy for his false complaint, and that the said *Anthony* go thereof without day &c.: and also that the said *Anthony* hold the tenements aforesaid, with the appurtenances, to him and his heirs, quit of the said *Charles Rishton* and his heirs for ever &c.”

1839.

Nesbit
against
Rishton.

Error was brought in the Court of King's Bench, on the ground that the judgment ought not finally to have barred *Rishton* and his heirs; and this Court reversed so much of the judgment as adjudged that the tenant should hold to him and his heirs quit of the demandant and his heirs for ever (*a*).

On this judgment error was brought in the Exchequer Chamber (*b*); the ground assigned being, that the judgment of the Court of King's Bench, so far as it reversed the judgment of the Court of Common Pleas at *Lancaster*, ought to have affirmed it. The writ of error was argued in the Exchequer Chamber in last *Trinity* vacation, *June* 17th, 1839, before *Tindal C. J.*, *Bosanquet*, *Vaughan*, and *Erskine Js.*, and *Parke*, *Gurney*, and *Maule Bs.*

Starkie, for the plaintiff in error (the tenant (*c*)). The judgment ought to have been final. A party who has pleaded ill cannot, on demurrer, put himself in a better situation by not appearing than if he had joined in demurrer. [*Tindal C. J.* A party may be nonsuited

(*a*) *Rishton v. Nesbit*, *Hil. T.* 1837, 6 *A. & E.* 103.

(*b*) A question was made in the Exchequer Chamber, whether error lay to that Court on a judgment of K. B. upon a writ of error from the Common Pleas, *Lancaster*; and it was held that the writ lay. *Nesbit v. Rishton*, 9 *A. & E.* 426.

(*c*) See stat. 3 & 4 *W. 4. c.* 27. sects. 36, 37, 38. In consequence of this alteration of the law, the arguments in the present case are reported in less detail than would otherwise have been thought necessary.

1839.

 NESBITT
 against
 RUSHTON.

on demurrer as well as on trial by a jury (a). He may be called to hear the judgment of the Court, as well as to hear the verdict.] The authorities shewing that where, on demurrer to the count, the demandant makes default, judgment against him is final, are the following: *Ferrer's Case* (b); *Bracton*, 372 b., 373 a, b. lib. 5. c. 5., and particularly the last sentence (c); *Fleta*, 401. lib. 6. c. 16. s. 4.; which last two passages are cited by Lord *Ellenborough* in *Doxland v. Slade* (d); *Worley v. Blunt* (e), where several authorities are referred to in the judgment of the Court; *Hull v. Blake* (g), *Tooth v. Boddington* (h). [*Tindal* C. J. The last three cases shew only that the Court will not assist a demandant by allowing him to amend.] There would have been no motive for applying if the judgment had not been final, because the demandant might have brought another writ, and was not subject to costs. The argument for the demandant in the Court of King's Bench was in reality grounded on a dictum of *Fitzherbert* J. (of *C. P.*) in *Yearb.* 26 *H.* 8. (i), that, in a writ of right, final judgment shall not be given but after mise joined. But the report there is very loose: in the case then before the Court the mise had been joined; and the dictum (if capable of any correct explanation) refers to the case of judgment against a tenant, who was compellable by *grand cape* to appear and join in the mise. The practice on this subject appears in *Glanville*, lib. 1. c. 21.; *Com. Dig. Pleader*, (B 11.). It has been a question whether, even on default after mise joined, final judg-

(a) See *Co. Litt.* 139 b.[(b) 6 *Rep.* 7 a. 9 a.(c) *Tindal* C. J. observed that the language there seemed to imply that the demandant appeared.(d) 5 *East*, 272, 290.(e) 9 *Bing.* 635.(g) 4 *Taunt.* 572.(h) 1 *Bing.* 208.(i) *Yearb. Mich.* 26 *H.* 8. f. 8 B. pl. 6.

ment

ment could be given against the tenant till a *petit cape* had issued: *Penryn's Case* (a), 3d resolution. The language of *Fitzherbert*, if accurate, would shew that in a writ of right there could be no final judgment on demurrer. The principle, applicable to the cases of both demandant and tenant, is, that the default by which final judgment is incurred must be after appearance. Lord *Coke* says, *Co. Litt.* 139 a., "It is a general rule, that nonsuit before appearance is not peremptory in any case:" and it may be inferred from the context that, after appearance, it is peremptory in a writ of right. The reason of the rule, in the case of a demandant, is, according to the same passage, that, till appearance, the identity of the party is not clear: "a stranger may purchase a writ in the name of him that hath cause of action." That final judgment may be given against the demandant in a writ of right, on default after appearance, is shewn by *Com. Dig. Pleader* (Y 1.); *Bro. Abr.* 257 b., *Droit de Recto*, pl. 57.; 2 *Fitzh. Abr. Judgement*, 55 b. pl. 245.; 9 *Vin. Abr.* 313., *Droit de Recto* (G), pl. 6. The tenant here is entitled to insist, not only on the default, but on the defect in the count, which is fatal; note (4) to *William, the heir of William, v. Gwyn* (b); and the demandant cannot avoid the consequences of a fatal defect by merely withdrawing himself from the Court. In *Heydon v. Smethwicke* (c), cited in the argument in *K. B.* (d), the dictum relied upon was extrajudicial; and the case differed from this, there being no defect in the count. The record here shews the parties to be both in Court, and no departure from the Court by the demandant, or

1839.

Nonsuit
against
Rishton.

(a) 5 *Rep.* 85 b.(b) 2 *Wms. Saund.* 45 e, f.(c) *Gouldsb.* 90. pl. 1. See *Heydon v. Igrave, Gouldsb.* 23. pl. 2.(d) 6 *A. & E.* 103.

1839.

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Namer
against
Rushton.

contempt on his part, but merely that the tenant demurs, and he makes no answer. That is not like the case of a mere default. *Co. Litt.* 295 b. was cited for the demandant in K. B.; but there it is said that judgment final shall be given "if the tenant after the mise joined make default, or confess the action, or if the demandant" (not repeating the words "after the mise joined") "be nonsuit."

Wightman, *contra*. Judgment may be given against the demandant for his default, or a defect in the count, but not final judgment if he does not appear by the proceedings to have asserted any right of his own. Where parties have asked leave to amend, the motive has probably been, not that judgment would be final, but that the demandant did not wish to incur more expense, or would have been too late to bring another writ of right. In *Penryn's Case* (a) it was resolved, after great deliberation, that final judgment was not to be given on default by the tenant, even after mise joined. *Ferrer's Case* (b) lays down the law much too broadly; for it is there said that, "when one is barred in any action real or personal, by judgment or demurrer, confession, verdict, &c. he is barred as to that or the like action of the like nature for the same thing for ever;" which is clearly not true under all circumstances. The passages from the older text books are not to be implicitly relied upon; but the dictum of *Fitzherbert J.*, that judgment shall not be final till after mise joined, is supported by several other placita (as pl. 5, 11, 12, 17.) in 9 *Vin. Abr.* 312, 313., *Droit de Recto* (G); also *Fitz. Nat. Brev.* f. 6 N., tit. *Writ of Right Patent*;

(a) 5 *Rep.* 35 b.(b) 6 *Rep.* 7 a.

f. 11 D.

§ 11 D., tit. *Writ of Ne Injuste Vexes*; *Lowe v. Paramour* (a); *Penryn's Case* (b), where, even though the mise had been joined, there appears to have been great doubt whether the judgment should have been final; and *Heidon v. Smethwick* (c). The material dictum in this last case was extrajudicial, but conformable to the authorities. In note (4) to *William, the heir of William v. Gwyn* (d) the cases stated in which final judgment is to be given, are all "after the mise joined." On the other hand, there is no authority for saying that, where no right has been asserted, but the tenant has merely demurred to the count, and the demandant has not appeared, final judgment should be given. The proceeding by petit cape in the case of a tenant, who may be in default because the former process has never reached him, cannot affect a case like the present. It would be unreasonable that, for a mere slip of the demandant in his pleading, final judgment should be given for a party who has not shewn the nature of his claim.

1839.

NEWT
against
RUSKIN.

Starkie, in reply. The position that final judgment cannot pass for a tenant who has alleged no claim is disproved by several of the authorities already cited, and in the placitum, 9 *Vin. Abr.* 312., *Droit de Recto*, (G) pl. 5., the final judgment appears to have been against the tenant. The passage cited from *Fitz. N. B.* f. 6. does not add any thing material to the argument for the demandant, and is, in fact, contradicted by the third resolution in *Penryn's Case* (b). The final judgment after mise joined, in *Lowe v. Paramour* (c), does

(a) *Dyer*, 301 a.(b) 5 *Rep.* 85 b.(c) *Gouldsb.* 90., pl. 1.(d) 2 *Wms. Saund.* 45 l.(e) *Dyer*, 301 a.

1839.

—
Nesbit
against
Rishton.

not shew that a like judgment might not have been given on default in an earlier stage of the cause. The same observation applies to *Penryn's Case* (a).

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court.

After stating the nature of the action, the judgment of the Court of Common Pleas, *Lancaster*, and judgment in error, his Lordship proceeded.

The present writ of error is brought by the tenant to review the judgment of the Court of Queen's Bench : but, after argument, and upon consideration, we think the judgment given by that Court is right.

It is to be observed, in the first place, that this is not even a judgment upon demurrer where the demurrer has been joined, and both parties are before the Court. It is a judgment upon a demurrer by the tenant, where the demandant has made default by not appearing on the day given to him to join in demurrer, so that, although the law may well be that if either party makes default at the day given, *after demurrer joined*, there shall be final judgment against him, as appears to be laid down in *Mod. Ca. 5. (b)* (for in that case, the demurrer having been joined, the Court is bound to give judgment upon the whole record), yet here the demandant, by not joining in demurrer, makes default, and both parties are no longer before the Court; and, consequently, the judgment against him ought, upon principle, to be strictly and properly that which is given where he is nonsuited, or non prossed, for any other default, after the appearance of the tenant, but before any

(a) 5 Rep. 85 b.

(b) *Staple v. Heydon*, 6 Mod. 1. 5.

answer put in by the tenant to the count. Now, in the case of any personal action, the judgment against the plaintiff, under these circumstances, would be that of barring him from maintaining that particular action, but not a final and perpetual bar against any other; and, so far, therefore, as any analogy holds, the judgment in a real action ought to be the same. And, looking at the authorities which have been brought before us, we think the weight of them is in favour of that conclusion. The authority of *Co. Litt.* 295 b. is very strong to the point, where the very reason upon which the nonsuit of the demandant in a writ of right is held to be peremptory appears to rest on the ground that it is a nonsuit after the mise joined on the mere right: nor is the authority of *Heydon v. Smethwick* (a) less decisive. It is very difficult to reconcile all the dicta of different judges in the Year-books upon this point; 2 *Fitzherbert's Abr.*, tit. *Judgment*, pl. 245., lays it down that final judgment shall not be given *but for default after the mise joined*. On the other hand, *Paston J.*, in *Bro. Abr.* tit. *Nonsuit*, pl. 26., states his opinion to be that, "if the plaintiff be nonsuited in a writ of right before appearance, judgment final shall not be given et e contrà *after appearance*." But, as we find the law held to the contrary by Lord *Coke*, with which the authority of *Gouldsbrough* agrees, and as the law laid down by Lord *Coke* agrees both with reason and analogy, we think that rule of law ought to prevail, and hold that the judgment of the Queen's Bench must consequently be affirmed.

Judgment affirmed.

(a) *Gouldsb.* 90. pl. 1. See *Heydon v. Tgrave*, *Gouldsb.* 23. pl. 2.

1839.

NEBART
against
RIGHTON.

C A S E S

1840.

ARGUED AND DETERMINED

IN THE

Court of QUEEN's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Hilary Term and Vacation,

In the Third Year of the Reign of VICTORIA.

The Judges who usually sat in Banc in this Term and Vacation were,

Lord DENMAN C. J.

COLERIDGE J.

LITLEDALE J.

WILLIAMS J. (a)

The cases decided in this term and vacation to which S. is added, are reported by *Edward Smirke*, Esquire.

(a) *Williams J.* was absent during the earlier part of the term, on the special commission for the trial of *Frost* and others, at *Monmouth*.

1840.

JOHN JOSEPH STOCKDALE *against* JAMES HANSARD, LUKE GRAVES HANSARD, LUKE JAMES HANSARD, and LUKE HENRY HANSARD. *Saturday, January 11th.*

AFTER the decision in the former cause between these parties (*Stockdale v. Hansard*, 9 A. & E. 1.), the plaintiff again obtained judgment in an action against the same defendants. A writ of inquiry of damages (*a*)

Goods of *H.* being taken under a *fi. fa.* for damages, a venditioni exponas was sued out, to which the sheriff

(after obtaining an extension of time) returned (*December* 19th) that he had sold for the money directed to be levied, and had the amount in Court to be rendered to the plaintiff, as commanded by the writ. He did not, however, on request, pay the money to the plaintiff, who, on the first day of the following term, obtained a rule calling on the sheriff to shew cause why he should not pay over to the plaintiff the amount mentioned in the return.

Held, no answer to this application, that the House of Commons, by resolutions subsequent to the granting of the rule, had declared the levy a contempt of their privileges, ordered the sheriff to pay back the money to *H.*, and committed the sheriff, for his alleged contempt, to the custody of the serjeant at arms, where he remained at the time of shewing cause.

Quære, whether, after such return as above stated, the sheriff could excuse non payment of the money under a rule of Court, by shewing that, without actual laches on his part, he had been prevented from paying it by superior force.

After the above return, and after the granting of the rule nisi, the Insolvent Debtors' Court, by an order purporting to be made in the matter of *S.* (the plaintiff), an insolvent, on the application of a creditor, directed the sheriff to retain the money levied till further order of that court, and that he and *S.* should shew cause why the money should not be paid over to the provisional assignee.

Held, that the pendency of such rule was no answer to the present application, since this Court, after directing the money to be paid over to *S.*, could provide, by further order, for the interests of parties really entitled.

And, the sheriffs not having paid over the money in obedience to the order, the Court made a rule for an attachment absolute against them, though they deposed that they were personally under confinement, and had no means of obeying the order but by directing their subordinate officers to pay the money, which if the officers did, they would probably incur a like imprisonment.

(*a*) In *Michaelmas* term, 1839, a motion was made in the Bail Court before *Littledale J.*, on behalf of the sheriff, for a rule to shew cause why the execution of this writ of inquiry should not be stayed till further order. Rule refused. *Stockdale v. Hansard*, 8 Dowl. P. C. 148. By the affidavits used on this application, it appears that the writ was issued to assess damages for libels published by the defendants on *June* 20th, 1839, concerning the plaintiff in his trade of a bookseller and publisher, and contained in the Reply of the Inspectors of Prisons, laid before the House of Commons, and printed by their order, as stated in the former case.

1840.

STOCKDALE
against
HANSARD.

was executed before the sheriff of *Middlesex*, *November* 12th, 1839, and the jury assessed the damages at 600*l*. The sheriff refused to return the writ till, on *November* 18th, he was ruled to do so; after which he returned the writ, and a *fi. fa.* issued, which the sheriff, after being ruled, returned, *November* 29th, with an indorsement that he had caused to be seized divers goods, &c., of the defendants, which remained in his hands unsold for want of buyers. The plaintiff then lodged a writ of *venditioni exponas* with the sheriff, to levy the damages, with costs, poundage, &c., and ruled him to return that writ; and the sheriff (after having obtained an extension of time by a judge's order) returned, on *December* 19th, 1839, that he had sold the goods for the money directed by the writ to be levied on the judgment, and had the money arising from such sale before the Queen at *Westminster*, to be rendered to the plaintiff as in the writ commanded. The plaintiff, on *December* 20th, applied at the sheriff's office for payment, but was told that the sheriff, acting under instructions from his officer, refused to pay the money over. The plaintiff obtained a summons calling on the sheriff to shew cause before a judge why he should not pay over the money. The learned Judge (*Patteson J.*), on *December* 22d, heard the parties, and refused to make an order, being of opinion that a Judge, on summons, had no such authority. The plaintiff again applied at the sheriff's office for payment, on *January* 10th, when the sheriff's deputy admitted that the money had been received, but said that the sheriff declined paying it, in consequence of instructions as before stated. On affidavit of these facts, *Platt*, on the first day of this term (*January* 11th), obtained a rule calling on the sheriff to shew

shew cause why he should not pay the sum of 622*l.* 7*s.* 2*d.*, received by him under the venditioni exponas, to the plaintiff.

In opposition to the rule, affidavit was made that the sheriff had, on *January* 15th, been served with the following order of the Insolvent Debtors' Court.

"Pursuant to the Act for the Relief of Insolvent Debtors in *England*. Court for relief of Insolvent Debtors.

"On the 14th day of *January* 1840.

"In the matter of the petition of *John Joseph Stockdale*, an insolvent debtor, lately a prisoner in the Debtors' Prison for *London* and *Middlesex*.

"Upon reading the affidavit of *Samuel Chamberlin*, of" &c., "whereby it appears to the Court that, since the said insolvent debtor became entitled to the benefit of the said act by adjudication made in the matter of his petition, he has become entitled to certain monies under a fieri facias issued against the goods of Messrs. *Hansard* at the suit of the said insolvent debtor :

"It is ordered, upon the application of the said *Samuel Chamberlin*, a creditor of the said insolvent debtor, that the sheriff of *Middlesex*, upon notice of this rule to be given to him, shall hold and retain the said monies till this Court shall make further order concerning the same; and that the said insolvent debtor and the said sheriff of *Middlesex* shall severally, on the 22d day of *January* instant, peremptorily shew cause to the Court why the said monies, or such part thereof as the Court shall think fit to order, should not be paid over to the provisional assignee of the estate and effects of the said insolvent debtor, for the general benefit of the creditors of the said insolvent debtor

1840.

STOCKDALE
against
HANSARD.

1840. debtor entitled to claim under the judgment entered up
by order of the Court in pursuance of the provisions of
the said act.

STOCKDALE
against
HANSARD.

“By the Court.”

“Upon the motion of Mr. Cooke.”

The deponent, upon whom (on the sheriff's behalf) this order had been served, stated his belief that the monies therein mentioned were those levied as above stated; and he swore that the affidavit was made without collusion with the plaintiff, defendants, or *Chamberlin*.

Mr. *Burchell*, agent for the sheriff, deposed (in an affidavit sworn *January 21st*) that he did on that day purchase, “at the office for the sale of parliamentary papers,” the printed paper annexed, which he believed “to have been printed and published by the authority of the House of Commons, and to contain the official notification of the votes and proceedings of the said House.” And he stated his belief that the cause of *Stockdale v. Hansard* therein mentioned was the present cause, and that the monies therein referred to were those mentioned in the present rule. The exhibit was a copy of printed votes and proceedings of *January 21st*, 1840, which contained the following resolutions of the House.

“That it appears to this House that execution in the cause of *Stockdale v. Hansard* has been levied to the amount of 640*l.* by the sale of the property of Messrs. *Hansard*, in contempt of the privileges of this House, and that such money now remains in the hands of the sheriff of *Middlesex*.

“That the said sheriff be ordered to refund the said amount forthwith to Messrs. *Hansard*.”

There

There was also an entry of a motion "That *William Evans*, Esq. and *John Wheelton*, Esq., sheriff of *Middlesex*, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant at arms attending this House, and that Mr. Speaker do issue his warrant accordingly." And it appeared that a debate arose upon the motion, and was adjourned (a).

A further affidavit (of *January 22d*) was made by Messrs. *France* and *Jackson*, under sheriffs of *London* and *Middlesex*, stating that Mr. *Evans* and Mr. *Wheelton* had been committed to and were in the custody of the Serjeant at arms of the House of Commons, by virtue of a warrant under the Speaker's hand, a copy of which was annexed. They stated their belief that the contempt and breach of privilege therein mentioned arose out of the due execution of the process in this cause by Messrs. *Evans* and *Wheelton* as sheriff, and that the resolutions annexed to *Burchell's* affidavit contained the grounds on which the House had adjudged them guilty of contempt, and on which they were now in custody.

The warrant was as follows.

"*Martis, 21^o. die Januarii.*

"Whereas the House of Commons have this day resolved that *William Evans*, Esq., and *John Wheelton*, Esq., sheriff of *Middlesex*, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant at arms attending this House.

"These are, therefore, to require you to take into

(a) These proceedings appear to have taken place at a morning sitting. See further, as to the steps taken by the House, pp. 274, &c., post.

your

1840.

STOCKDALE
against
HANSARD.

1840.
 ———
 STOCKDALE
 against
 HANNAH.

your custody the bodies of the said *William Evans* and *John Wheelton*, and them safely to keep during the pleasure of this House.

“For which this shall be your sufficient warrant.

“Given under my hand the 21st day

“of *January 1840*.

“*Charles Shaw Lefevre*,

“Speaker.

“To the Serjeant at arms

“attending the House of Commons.”

R. V. Richards, W. H. Watson, and Kennedy, on a subsequent day of the term (*January 22d*), shewed cause. The object of this application is to render the sheriff liable to an attachment, as being in contempt of this Court. It is not contended, on the sheriff's behalf, that an order of this Court is not to be obeyed; and he is willing to comply with any that may be pronounced. But the Court will not think it fit, under the circumstances, to embarrass him by acceding to this summary application. The sheriff, who has evidently acted *bonâ fide*, must, in order to be discharged from the custody of the Serjeant at arms, refund the money levied; and, if this rule be made absolute, he will, immediately on his release, be taken into the custody of the marshal on an attachment, from which he can liberate himself only by paying the money a second time to the plaintiff. The proper remedy in a case of this kind is by action against the sheriff; the proceeding by rule is a modern practice, and ought to prevail only where no difficult question of law or fact arises. If, after levy made, the plaintiff moved for a return of the writ, and it was alleged that he had become bankrupt, the Court would not determine the question

question of bankruptcy or no bankruptcy on the application for a rule, but would leave the plaintiff to his remedy by action, in which the grounds of dispute would appear on the record. So, where a submission to arbitration has been made a rule of Court, the Court will not grant an attachment for non-performance if the right be not clear. In this case the House of Commons have voted that the levy was a contempt of their privileges; and that is a judgment which, when brought before this Court, is not to be inquired into, even according to the decision in *Stockdale v. Hansard* (a). It is enough for the present argument if the levy could by possibility be a contempt of the House; as if the sheriff had entered the house and seized goods in the presence of the members while sitting. The case might be analogous to that of process executed against the person while the party was attending a court of justice. Again, if a sheriff were bringing money into court in obedience to a rule, and it were violently taken from him (in a county where he could not raise the posse), he would not be guilty of a contempt in failing to bring the money in. No less ought he to be excused, if his obedience to the rule of this Court is prevented by an incontestable assertion of privilege. In *Winter v. Miles* (b) the sheriff was held to be justified in returning nulla bona to a fi. fa., the only goods of the defendant in his bailiwick being on premises which were privileged as a royal palace. In *Coates v. Lord Hawarden* (c), where an *Irish* peer had been held to bail on a capias, this Court set aside the writ and ordered the bail bond

1840.

STOCKDALE
against
HANSARD.

(a) 9 A. & E. 1. Reference was made particularly to the words of *Patteson J.* at p. 195. beginning, "It is, indeed, quite true" &c.

(b) 10 East, 578.

(c) 7 B. & C. 388.

1840.

STOCKDALE
against
HANSARD.

to be cancelled. Suppose, in that case, the House of Lords had ordered the defendant to be discharged, would this Court have deemed the sheriff guilty of a contempt in not enforcing its process? In *Executors of Skewys v. Chamond (a)*, *Trewynard*, a member of the House of Commons, being in the custody of the sheriff of *Cornwall* in execution, a writ of privilege issued to the sheriff, who thereupon (during the session of parliament) released him: and it is there laid down (*b*) that, "although parliament should err in granting this writ, yet it is not reversible in another court, nor any default in the sheriff." If there be even a doubt here, whether the sheriff has not acted justifiably, the Court will not allow this summary mode of proceeding. There does not appear to be any precedent for a rule to pay over money after the return of a *venditioni exponas*.

An additional difficulty is created by the order of the Insolvent Debtors' Court, which, under stat. 1 & 2 *Vict. c. 110.*, clearly has jurisdiction over the subject-matter; sects. 36, 37; and an authority over the sheriff; sect. 110; and may punish disobedience of its orders as a contempt; sect. 66. This is an order duly made under sect. 89. [Lord *Denman* C. J. The Court does not state that its proceeding is taken under that clause; and there is no affidavit before us as to the grounds for making the order. A rule to shew cause has been granted, we do not know upon what facts.] The order, even if ill founded, is sufficient answer to the present application. [Lord *Denman* C. J. Ought not the assignee to have made an application to this Court? and may not he still do so if this rule be made absolute?

(a) 1 *Dyer*, 59 b. S. C. as *Trewynard's Case*, 1 *Hats. Prec.* 60.

(b) 1 *Dyer*, 61 b.

Coleridge

Coleridge J. The sheriff might have applied to the Court under the Interpleader Act (a).] There is no party whom the sheriff could have called upon by an interpleader rule. The provisional assignee does not appear upon the order of the Insolvent Debtors' Court as a moving party. *Chamberlin* is not a claimant within the meaning of the act. The insolvent, of course, could not be called upon. But, if the present rule be discharged, the plaintiff, on the one hand, or any person interested in his estate under the statute, on the other, may bring an action against the sheriff.

1840.

STOCKDALE
against
HANSARD.

Platt and Carrington, contra. This rule was granted on January 11th; the order of the Insolvent Debtors' Court was served only on the 15th; it does not appear at whose instance the order was made; nor is it even stated on affidavit that the plaintiff has become entitled to his discharge under the present or any insolvent act. [Lord *Denman* C. J. here intimated that it was unnecessary to hear this point further argued, for that, if the rule were made absolute, the Court would take care that no injustice was done to the parties who might prove to be really interested.] Then, as to the vote of the House of Commons. It is assumed on behalf of the sheriff that the validity of that resolution cannot be enquired into. But there are supposable cases in which that enquiry must take place. If the sheriff, when committed, had killed the officer attempting to apprehend him, a criminal court must have examined into the legality of the warrant. That warrant, in the present case, is studiously framed so as to avoid inquiry: but the

(a) 1 & 2 W. 4. c. 58.

1840.

—
STOCKDALE
against
HANSARD.

Court will not therefore withhold the justice demanded. It is contended that the Court ought not to interfere summarily, but should leave the plaintiff to his action, this being a case of doubt. If an action were brought, the difficulty now stated would still arise, for the House would pronounce the action a contempt, and the coroner would be in the situation which the sheriffs are placed in now. In *Dale v. Birch* (a) an action of this kind was complained of as vexatious. Of late years, at least, wherever execution has issued, and no circumstance has occurred which legally changed the situation of parties, this Court has enforced the process summarily. Supposing an action to be proper in a doubtful case, there is no real doubt here. The sheriff has concluded himself by his return, which admits that he has the money ready. In *Winter v. Miles* (b) the sheriff had returned nulla bona. The present case is not like those which have been referred to, of bankruptcy, or awards, where both parties submit themselves to the decision of the Court on a difficult question of fact or law. Here the sheriff alleges that which, in effect, is a denial of the jurisdiction; but the question on that point has already been decided by the Court in *Stockdale v. Hansard* (c); and the decision has been acquiesced in; for, although the point appeared on the record, no writ of error was brought. The House of Commons has no right, by its resolution, to order that a sum of money claimed in an action by *Stockdale* shall be paid to *Hansard*.

Lord DENMAN C. J., after having stated the proceedings down to the return of the venditioni exponas,

(a) 3 Camp. 347.

(b) 10 East, 578.

(c) 9 A. & E. 1.

continued

continued thus. An application had been previously made for time to return the writ, and my brother *Little-dale* granted it, only for the convenience of sale. After the return, a motion was made before my brother *Patteson*, at chambers, for an order upon the sheriff to pay over the money levied. That the learned Judge refused. We have enquired his reasons, and find that the refusal proceeded wholly on his view of the practice of the Court, which appeared to him not to warrant such an order by a judge at chambers. He therefore referred the matter to this Court: the plaintiff has brought it before us, and we are to give judgment on the application. The plaintiff has recovered damages in an action, and has sued out process of execution in due course of law. What is to prevent him from obtaining the fruits of that execution? Nothing that I am able to perceive. I infer, from the resolutions brought before us, that the House of Commons disapprove of our judgment in the former case between these parties, and I deeply lament it; but the opinion of that House on a legal point, in whatever manner communicated, is no ground for arresting the course of law, or preventing the operation of the Queen's writs in behalf of every one of her subjects who sues in her courts.

The first resolution states that the levy has been made in contempt of the privileges of the House. But I do not think that can affect the present application. Cases have been put in which we may suppose a contempt to have been committed in executing a writ; but even there it may not follow that the plaintiff ought to be deprived of the fruits of his execution. If, indeed, the warrant here had shewn what caused the execution to be a contempt of the House, we might possibly

1840.

STOCKDALE
against
HANSARD.

1840.
 STOCKDALE
 against
 HANSARD.

have been bound by such a statement on the present application. I do not say how that might be; but here no ground is assigned for suspending the execution, except that it is levied "in contempt of the privileges" of the House. As to the next resolution, "that the said sheriff be ordered to refund the said amount forthwith to Messrs. *Hansard*," I am at a loss to see how that can prevent the party here from obtaining the fruits of his execution. We must feel deeply the situation of the sheriff: but, unless by a legal return, the plaintiff cannot be prevented from recovering the amount due. The supposition has been put, that a superior force might prevent the sheriff from bringing into Court money which he had levied. That is a new point. Probably such a return, if ever made, would be held insufficient; but no such case arises here, for it was the sheriff's duty to pay over the money as soon as received; the obstruction takes effect through his delay (a). Then as to the resolution by which the sheriff is committed to custody. I am not required to comment on this any further than is necessary for deciding upon the rule; and, as the sheriff may have acted in contempt of the House of Commons without vitiating the process of this Court which he had to execute, the plaintiff ought not, on account of this vote of the House, to lose the benefit of his execution. If, indeed, I had a discretion to exercise, and the liberation of the sheriff depended on my decision, I should pause long before I made a rule absolute which might have the effect of exposing the officers to a further detention, and of causing great injustice to be done. But there is no

(a) The levy, and refusal to pay over the money to the plaintiff, took place during the recess of parliament.

ground

ground upon which we can know that such injustice will be done. As to the direction that they refund the money, that, if the rule be absolute, will make no difference, because, if hereafter they are called upon to do so, they will have parted with the means. But this Court has no power of exercising a discretion. Applications like the present have not been common : but neither the principle nor the practice of calling on a sheriff by the authority of the Court to execute process, is disputed ; and it has not hitherto been supposed that the sheriff, under any ordinary circumstances, would withstand the requisition of the writ. My only doubt, however, has been, whether the practice on this subject was so settled that no discretion was left to the Court. But the rule of practice is, on consideration, so clear, from the relation of the sheriff to the Court, in a case, too, where he himself, by his return, admits having the money to be rendered to the plaintiff, that we cannot hold our hand, and must decide that the sheriff is to pay the money over. I abstain from any observation on the more delicate topics which have been touched upon, and wish to say that we decide the case only on the rule of practice.

1840.

STOCKDALE
against
HANSARD.

LITLEDALE J. I am of the same opinion. The sheriff has returned, to the venditioni exponas, that he has sold the goods, and has the money, to be rendered to the plaintiff. On his not doing so, the plaintiff had two remedies, by action or by motion. He has adopted the latter ; and it was competent to him to do so. The question is, whether, under the circumstances now stated, the rule can be made absolute ? No adequate cause is shewn to the contrary. The three resolutions

1840. which have been stated are not sufficient to prevent the law from taking its ordinary course. They have been fully commented upon by my Lord ; and in what he has said I entirely agree.

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STOCKDALE
against
HANSARD.

WILLIAMS J. I am of the same opinion ; and I am desirous to consider this as a point of practice. Mr. *Richards* assimilated the present case to those in which indulgence has usually been shewn to the sheriff as an officer of the Court, under circumstances of difficulty. But I must observe that a considerable part of the sheriff's difficulty in this case has arisen from his own delay. On *December* 19th he had levied and had the money ready. On the 20th the plaintiff demanded it. The sheriff allowed all *December* and *January*, down to the first day of this term, to pass, without paying it over. His difficulty has resulted from his not actually bringing the money into Court which his return states that he has, and which, when brought in, would have been for the plaintiff's use. This case does not come within the principle of those in which bankruptcy has intervened, or a real doubt has arisen as to the right. There the sheriff has been protected by allowing time till claims could be adjusted and he could be in a situation to defend himself against the party not entitled. But I know no case in which the interposition of a *vis major* has been held an excuse. Where questions have arisen on the legality of an award, the parties enforcing it have been put to their action, because, when a doubtful point of law arose, it was fit that the parties should be driven to that remedy by which the point might effectually be tried. But those precedents do not apply where no doubtful point of law intervenes. And what is

is the doubt here ? None, as to the plaintiff's right to have the money which is in Court. That the sheriff is in a situation of difficulty we must regret : but what answer is that to the present application, the money being in Court, waiting only the actual transfer to the party entitled. Without touching on any other points, I think that to refuse this application would be violating the practice of the Court, and depriving the plaintiff of an ordinary and, I will add, a just remedy, without seeing any cause in law for so doing. On that ground I decide.

1840.

STOCKDALE
against
HANSARD.

COLERIDGE J. I agree entirely with the rest of the Court in the decision and the grounds assigned for it. The sheriff having returned, on *December 19th*, that he had sold the goods, and had the money ready to be rendered, there appears on these affidavits nothing, either of fact or law, which could prevent him from paying over the money on *December 20th*. The plaintiff's demand against the defendants was satisfied ; the money was his property : if the defendants had become bankrupt or absconded, he had no remedy against them. That was the state of facts on *December 20th*. The only excuse for the sheriff takes its rise from that which happened on the 21st of *January*. Two remedies were open to the plaintiff on the sheriff's refusal to pay over the money ; by action, or by rule of Court. As to an action, it is true, as Mr. *Platt* says, that, if that course had been taken, and the action followed up to execution, the state of things would have been the same as it now is ; and so an interminable series of actions might have been brought with a like result, to the great disgrace of the law. The plaintiff's demand
would

1840.

STOCKDALE
against
HANSARD.

would have been satisfied; the money in the hands of the officer; and yet, according to the present argument for the sheriff, the Court would have been obliged, in each instance, to pursue a course by which the plaintiff would have lost his remedy. This consideration, however, is not sufficient, if there be any well founded objection to the second remedy, by rule of Court. It is said that the application is novel; and, if the want of precedent is a ground for refusal, then, the sheriff being in Court, with the money, and no legal objection raised to his paying it into the hands of that party whose money, by his admission, it is, we are to tell him not to make the payment. It would be trifling with justice to do so. As to the difficulty imposed on the sheriff, I might say much on the situation in which these gentlemen are placed: but they are officers of the Court; and we are bound to see that suitors obtain the fruits of decisions in their favour. The case has been likened to those arising on bankruptcy and awards: but, where a plaintiff is said to have become bankrupt, the suggestion is that a question of property has arisen; the assignees and the alleged bankrupt have rival claims; and it would be unjust if the sheriff were exposed to the hazard of determining between them. So, in the cases where grave doubt arises as to the validity of awards, a question is raised affecting the right of property. Here no such doubt is suggested; it appears only that, by reason of what may be termed *vis major*, the sheriff is in a situation of difficulty. The plaintiff has no concern with that. No difficulty in law is raised, as between the plaintiff and defendant in this cause; and, if there were any, the plaintiff would still have a right to the sum recovered, since the action has not been defended. The only

only doubt which can be suggested in point of law regards the correctness of our judgment in the former case between these parties; and that, never having been legally disputed, is as binding upon us, till reversed, as any decision ever pronounced by a court of justice. We should therefore be wanting in our duty if we did not make this rule absolute.

1840.

STOCKDALE
against
HANSARD.

Rule absolute.

This rule having been served on the sheriff and not obeyed,

Platt, on a subsequent day of the term (*January 27th*), obtained a rule nisi for an attachment against the sheriff for nonpayment of the money. The rule was obtained on affidavit of the service of the rule of 22d *January*.

In answer, the sheriff, Messrs. *Evans* and *Wheelton*, made affidavit, giving the history of the proceedings down to and including the decision of this Court, of the 27th *January* (*a*), remanding them to the custody of the Serjeant at arms. They added, that they had acted bonâ fide, and to the best of their judgment, as officers of the court, 'in execution of its process; and that they had been, and were, kept in prison in order that they might be compelled to pay back the money to the defendants instead of paying it to the plaintiff according to the writs, and the orders and rules of the court. That they had no power, by reason of their imprisonment, to

(a) On that day Messrs. *Evans* and *Wheelton*, the sheriff, were brought before the Court on habeas corpus, and a motion made for their discharge; but, after argument on the return, they were remanded. See the *Case of the Sheriff of Middlesex*, p. 273. post.

1840.
 ———
 STOCKDALE
against
 HANSARD.

go and procure the money, to pay it over in obedience to the rule of court, or actually to pay it to the plaintiff, and could obey the rule only by desiring the under sheriffs, or other officers, to pay it, whom they believed they should thereby expose to imprisonment. And they submitted to the Court, whether they ought to place the under sheriffs or others in peril, unless the court could protect them in obedience to itself. On *Thursday*, 30th *January*,

Kelly and *R. V. Richards* shewed cause. The sheriff does not seek to call in question the decision of the Court directing the payment of the money to the plaintiff. But the present motion is for an attachment; and no contempt appears: the sheriff is physically unable to obey the order of the Court in person; and the Court will not consider that a contempt is committed in not directing the subordinate officers to do that which will immediately subject them to imprisonment. It is as if there were a rebellion, and the sheriff were in custody of the rebels, and the duty imposed were one which it was impossible for the under sheriff to perform, without immediately falling into their hands. In such a case there would be no contempt in not discharging the duty.

Platt, *contra*, was stopped by the Court.

Lord DENMAN C. J. It is suggested that, under these painful circumstances, we cannot truly say that a contempt has been committed by not paying the money. I say, without any hesitation, that, if this were a mere penal proceeding, I should think it an act of the utmost injustice

injustice to inflict any thing like punishment on these gentlemen: their conduct does them honour; and all persons are bound to brave such consequences as may be brought upon them by obedience to the law of the land. But the question is, whether the plaintiff has not a right to call upon the sheriff to pay over to him the money which that officer holds to his use. He has as much right to that money as any member of either House of Parliament has to his estate. We, having put the law in motion, are bound to enforce it for him: and there is, unfortunately, no other mode of doing so than the proceeding now suggested. It is said that the sheriff may be hindered from performing the duty by physical force. Without casting any reproach upon these gentlemen, and thinking it quite natural that they should wish to have the direction of this Court in every step of their proceedings, yet, if that support could be purchased by a delay which was so far a postponement of the discharge of their duty, I must still say that the individual for whom they are trustees is not to suffer by their taking a prudential course in that respect. It is suggested, now, that the law cannot be carried into effect without exposing others to the inflictions to which these gentlemen have been subjected. I trust that will not be the case. But, whatever the consequences may be, this is a mere civil process to enable a party to a cause tried in this Court to obtain his rights; the Court has no discretionary power; and the rule must be made absolute.

LITLEDALE J. Although this is a personal application against the sheriff, and he might be lodged in prison if

1840.

STOCKDALE
against
HANSARD.

1840.

STOCKDALE
against
HANSARD.

if he disobeyed it, as being guilty of a contempt, still it is a mere civil proceeding to enforce the payment of money which cannot be otherwise got. Although there has been no personal contempt of the Court, and the sheriff is here placed in circumstances of peculiar difficulty, yet it is the ordinary course that the sheriff should be ordered to obey the direction of the Court. He may not be able to do so personally; but in many cases it is left entirely to subordinate officers to perform the duties of sheriffs. Proceedings are often taken against sheriffs: actions are brought against them; or they are ordered to pay over money, or to bring in the body. In the last case, it is perfectly understood that the meaning is that the sheriff is bound to pay the debt and costs, or to take care that bail be put in to the action. That is a mere civil process: and so is the writ which we are now called upon to issue. This is, therefore, an ordinary case; and the plaintiff is entitled to have the rule made absolute, that he may obtain his money in the ordinary way in which a party gets money out of the sheriff's hands.

WILLIAMS J. I am entirely of the same opinion. This is a necessary consequence of the decision to which we came the other day. It is not suggested that there is any other mode of enforcing the order: if there had been, no doubt the circumstances under which these gentlemen are placed would have entitled them to the most lenient consideration. But the simple ground of decision appears to me to be, that an ordinary motion has been made, and an order thereupon, which has not been complied with, and this is the ordinary method of enforcing

enforcing compliance in such a case. The present step therefore follows, as a matter of course, from that which we have already taken (a).

1840.

STOCKDALE
against
HANSARD.

Rule absolute (b).

(a) Coleridge J. was absent.

(b) See the next case.

The following case may conveniently be added here.

Case of the Sheriff of MIDDLESEX.

Monday,
January 27th.

R. V. RICHARDS, on January 23d in this term, moved for a writ of habeas corpus requiring Sir William Gosset Knight, Serjeant at arms of the House of Commons, or other person having the custody &c., to bring before this Court the bodies of *William Evans* Esquire, and *John Wheelton* Esquire, with the day and cause of their being taken and detained &c., to undergo &c.

To a habeas corpus ad subjiendum &c. it was returned by the Serjeant at arms of the House of Commons that he detained the prisoners on the following warrant, directed to him by the Speaker.

The motion was made on the affidavit of Messrs. *Evans* and *Wheelton*, sheriff of *Middlesex*, which set out the various proceedings in the cause of *Stockdale v.*

"Martis 10^o
die Januarii,
1840. Whereas
the House of

Commons have this day resolved that *W. E.* and *J. W.*, sheriff of *Middlesex*, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant at arms attending this House, these are therefore to require you to take into your custody the bodies of the said *W. E.* and *J. W.* and then safely to keep during the pleasure of this House, for which this shall be your sufficient warrant. Given under my hand," &c. "*C. S. Lefevre*, speaker."

Held,

1. That the warrant was not bad for omitting to state the grounds on which the parties had been adjudged guilty of contempt.

2. That this Court could not inquire by affidavit into the merits of the commitment, even if the case were within stat. 56 G. 3. c. 100. Although, in affidavits on which the habeas corpus issued, it was sworn that the parties were in fact committed for executing process in obedience to rules of this Court.

3. That the word "having," in the warrant, was a sufficient averment that the parties had been guilty of contempt.

4. That the return sufficiently shewed an authority to issue such warrant on behalf of the House.

5. That the words "this House," in the warrant, were not uncertain, no house being therein mentioned but the House of Commons.

6. That the warrant was not too uncertain in alleging "a contempt and breach of the privileges of this House," and not a contempt of the House.

Hansard,

1840.

Case of the
Sheriff of
MIDDLESEX.

Hansard, detailed in the last case, down to the return of the venditioni exponas. It then stated that they had declined paying over to the plaintiff the money levied, without an order of this Court, having been served by Messrs. *Hansard*, the defendants in the above-mentioned cause, with a notice informing the deponents of certain resolutions passed by the House of Commons on May 30th, 1837, and August 1st, 1839 (a), and warning them that, if they proceeded in the levy, their conduct would be represented to the House, and they would become amenable to its authority, as expressed in the said resolutions. The affidavit then stated the service upon the deponents of the rule nisi granted by this Court on the first day of the present term, as stated in the preceding case, and the order of the Insolvent Debtors' Court, also stated there: and that they were afterwards served with orders to attend the House of Commons, and bring with them all notices served upon them in respect of this cause, and all writs, rules of

(a) The former resolutions were stated in the affidavit as follows.

"1. That the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of parliament, more especially of this House, as the representative portion of it. 2. That, by the law and privilege of parliament, this House has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit, or other proceeding, for the purpose of bringing them into discussion or decision before any court or tribunal elsewhere than in parliament, is a high breach of such privilege, and renders all parties concerned therein amenable to its just displeasure, and to the punishment consequent thereon."

The latter resolutions had reference to a report published by Messrs. *Hansard* under the orders of the House, respecting the Islands of *New Zealand*, and declared that "to bring or assist in bringing any action against them" (Messrs. *Hansard*) "for such publication would be a breach of the privilege of this House;" they also directed Messrs. *Hansard* not to defend an action with which they were threatened for publishing the report.

court

court, orders, or other authorities, &c., in obedience to which they had acted therein. That in obedience to such orders they attended the House and were examined at the bar touching the execution of the said writs &c. That on *January 21st* the House resolved (as appears by the votes and proceedings) that the execution had been levied in contempt of the privileges of the House; and that the sheriff should be ordered to refund the amount (a): and that *William Evans* and *John Wheelton* Esquires, sheriff of *Middlesex*, should be then called to the bar, and the resolutions communicated to them by the Speaker. That the deponents were then called to the bar, and the resolutions communicated to them by the Speaker, who acquainted them that, if they had any thing to say to the House, the House was ready to hear it; whereupon the deponents withdrew. And it was further resolved (and appears by the votes and proceedings of the House) as follows: "That *William Evans* Esquire and *John Wheelton* Esquire, sheriff of *Middlesex*, having been guilty of contempt and breach of the privileges of this House, be committed to the custody of the Serjeant at arms attending this House, and that Mr. Speaker do issue his warrant accordingly."

The deponents then stated, "That they were thereupon taken into custody of the Serjeant at arms, Sir *W. Gosset*, Knight, for not paying over, as they believe, the said money in obedience of the said order; and they are informed, but of their own knowledge they do not know, that some warrant or other document has been made out by the Speaker of the said House of Commons, or some other person, under which the said Serjeant at

1840.

Case of the
Sheriff of
MIDDLESEX.

(a) See these resolutions, p. 256. *antè*.

1840.

Case of the
Sheriff of
MIDDLESEX.

arms detained deponents in custody : but they further say that they have not, nor hath either of them, read the same or any copy thereof, or heard the same or any part read by any person whatsoever, but a paper purporting to be a warrant was shewn to them these deponents. That they are not detained in the custody of the said Serjeant at arms for or by reason of any cause other than for the matters aforesaid. That, throughout the whole of the said proceedings in this cause, they have acted bonâ fide and to the best of their judgment as officers of this Court in the execution of the process of the Court. That they have been committed to the custody of the Serjeant at arms of the said House by reason only, as they verily believe, of what they have so done in the discharge of their duty as officers of this Court, and in obedience to her Majesty's writs, and to the rules and orders of the Court; and that they have been and are thus imprisoned and continued and kept in prison in order, amongst other things, that they may thereby be induced or compelled to pay back the said money to the said defendants in the said cause, instead of paying it over to the said plaintiff in the said cause, according to the writs, rules, and orders aforesaid. That they have throughout the whole of the said proceedings been earnestly desirous, and still are so, to do their duty in their said office faithfully to her Majesty and to this Court, and that they are hindered and obstructed and put in peril and danger in so doing, in consequence of the said order to refund the said money to the said defendants, and by reason of their being imprisoned and detained as aforesaid. That they would not have been committed to custody at all if they had complied with the said order to refund the said amount to the said defendants."

On

On *Monday, January 27th*, the Serjeant at arms brought into Court Messrs. *Evans* and *Wheelton*, the sheriff, and made the following return.

1840.

Case of the
Sheriff of
Middlesex.

"I, the said Sir *William Gosset*, Knight, Serjeant at arms of the House of Commons in the writ hereunto annexed named, do hereby certify and return, in obedience to the said writ, that, before the coming of the said writ to me, towit on the 21st day of *January* A.D. 1840, I did take into my custody, and have thenceforth always hitherto detained in my custody, and still do detain in my custody, the said *William Evans* Esquire, and *John Wheelton* Esquire, in the said writ named, under and by virtue of a certain warrant under the hand of the Right Honourable *Charles Shaw Lefevre*, Speaker of the said House of Commons, which said warrant is as follows.

"*Martis 21^o die Januarii* 1840.

"Whereas the House of Commons have this day resolved that *William Evans*, Esquire, and *John Wheelton*, Esquire, sheriff of *Middlesex*, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant-at-arms attending this House :

"These are therefore to require you to take into your custody the bodies of the said *William Evans* and *John Wheelton*, and them safely to keep during the pleasure of this House; for which this shall be your sufficient warrant.

"Given under my hand

"the 21st day of *January* 1840.

"(Signed) *Charles Shaw Lefevre*,

"Speaker.

"To the Serjeant at arms

"attending the House of Commons."

1840.

Case of the
Sheriff of
MIDDLESEX.

“ And I do hereby further certify and return, in obedience to the said writ, that the above is the cause of my taking and detaining in my custody, as in the said writ mentioned, the said *W. E. Esquire* and *J. W. Esquire*, the bodies of which said *W. E. Esquire* and *J. W. Esquire* I have here ready as in and by the said writ I am commanded.

“ *William Gosset.*”

R. V. Richards then moved that the return should be filed (*a*), which being done, he moved that *Messrs. Evans* and *Wheelton* should be now discharged.

R. V. Richards, *W. H. Watson*, and *Kennedy*, in support of the motion. The present return is bad on three grounds. First, there is in fact no legal cause for the commitment. The Court may inquire into this, by stat. 56 G. 3. c. 100. Sect. 1, after a general recital, that “ the writ of habeas corpus hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty, who hath been unjustly deprived thereof,” and that “ extending the remedy of such writ, and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous,” enacts “ that where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit),” a judge shall, on proper complaint, award a habeas corpus. Sect. 3 enacts that in all cases provided for by the act, although the return to the habeas corpus be sufficient in law, it shall be law-

(a) As to filing, see *Leonard Watson's Case*, 9 A. & E. 731. 746.

ful for the judge, before whom it is returnable, to examine into the truth of the facts therein set forth, by affidavit or by affirmation &c., and to do therein as to justice shall appertain; and, if the truth of the facts returned appear to him doubtful on such examination, he may bail the party and transmit the writ; return, &c., to the Court of which he is a Judge, whereupon "it shall be lawful for the said Court to proceed to examine into the truth of the facts set forth in the return, in a summary way by affidavit" &c., "and to order and determine touching the discharging" &c. Sect. 4 enacts "that the like proceeding may be had in the Court for controverting the truth of the return to any such writ of habeas corpus," "although such writ shall be awarded by the said Court itself, or be returnable therein." Now, an attachment for contempt is not a "criminal or supposed criminal matter," within the statute. The usual instances of contempt are non-payment of money, or disobedience of rules or subpoenas. In the present case it is clear that no criminal charge is in question. The words, "criminal or supposed criminal matter," are adopted from the habeas corpus act of 31 Car. 2. c. 2. sects. 1, 2. *Ex parte Beeching* (a) and *Hobhouse's Case* (b) are among the cases which shew how the words in that act have been construed. In the latter case, this Court refused to enter into the merits of the commitment; but there stat. 56 G. 3. c. 100. was not brought to their notice; and the case is the only one, since that statute, bearing on the present question. *Burdett v. Abbot* (c) was before the statute. Then, if the Court may inquire into

1840.

Case of the
Sheriff of
MIDDLESEX.

(a) 4 B. & C. 136.

(b) 3 B. & Ald. 420. S. C. 2 Chitt. Rep. 207.

(c) 14 East, 1.

1840.

Case of the
Sheriff of
MIDDLESEX.

the truth of the facts, it is shewn here, on affidavit, that the sheriff is committed for having acted in the lawful execution of process, and that the proceeding of the House of Commons is in opposition to the judgment delivered in *Stockdale v. Hansard* (a), which, until reversed on appeal, is the law of the land. It may be said that the statute allows only an examination into the truth of the matters set forth in the return, and that the facts here relied upon for the sheriff are not so set forth. But it is not denied that the cause of committal is the refusal to pay back the money levied; and, if a return is so framed as to involve a number of propositions in one general averment, the Court will not therefore refuse to inquire into the whole truth. Otherwise, a return of this kind might be advised, in bad times, for the very purpose of excluding the jurisdiction of a court of law. The affidavit here is not offered for the purpose of traversing the return (which, according to *Leonard Watson's Case* (b), might perhaps not be allowable if this were considered as a criminal matter), but of explaining it, and of shewing what the supposed contempt is, by matter consistent with the return. Five of the ten Judges who, in 1758, delivered their opinions to the House of Lords on the proceedings upon habeas corpus, do not deny that such affidavits may be used (c).

Secondly, this return is bad, because it does not state the facts on which the contempt arises. It is true, that attachments for contempt, issuing out of this Court, are worded generally; but, in those, the process always contains a reference to the cause in which it is

(a) 9 A. & E. 1.

(b) 9 A. & E. 731.

(c) 4 Bac. Abr. 140. (7th ed.), *Habeas Corpus*, (B). 15 Parl. Hist. 903.

issued;

issued; and the proceeding is one which only calls upon the party to answer and purge his contempt; it is not final, and for the purpose of punishment, like this commitment, which affords no opportunity of purging the contempt. If commitments in the present form be held good, the most obvious deprivation of justice may take place without remedy. They may be supported by some precedents; but precedent has been adduced, in former times, for exertions of prerogative which have since been deemed clearly unjustifiable, as in *Sir Thomas Darnel's Case* (a) and *The Case of Ship-money* (b). But there are only three precedents of parliamentary commitments which have been supported, where no grounds were set forth. The first is in *Streater's Case* (c), which, from the absurdity of the reasons by which the commitment was upheld, cannot be considered of any weight. The next occurs in *The Earl of Shaftesbury's Case* (d), which was decided in bad times, and is not a precedent by which any subsequent decision can be supported. The proceedings of the House of Lords against the Earl were, by the House itself, in 1680, declared unparliamentary, and ordered to be vacated in the Journals, that they might never be drawn into a precedent (e). Yet they were at least so far justifiable, that Lord *Shaftesbury* was a member of the House, and the alleged contempt was committed in one of their sittings. This last circumstance was noticed in *Regina v. Paty* (g) by *Holt C. J.*, who did not, like the other judges, yield to the au-

1840.

Case of the
Sheriff of
MIDDLESEX.

(a) 3 *How. St. Tr.* 1.(b) 3 *How. St. Tr.* 825.(c) 5 *How. St. Tr.* 365.(d) 6 *How. St. Tr.* 1269. * *S. C.* 1 *Mod.* 144.(e) 6 *How. St. Tr.* 1310. See the observation of Lord *Ellenborough* in *Burdett v. Abbot*, 14 *East*, 124.}(g) 2 *Ld. Raym.* 1105. 1115: And see the judgment of *Powell J.* p. 1110.

1840.

Case of the
Sheriff of
MIDDLESEX.

thority of *The Earl of Shaftesbury's Case* (a). The third instance, and the only one since the Revolution, was in *Alexander Murray's Case* (b). There, indeed, two of the judges, one of whom relied on the case of Lord *Shaftesbury* (a), said that, even if the contempt had been specified, this Court could not judge of it; but the third, *Foster J.*, appears to have relied upon the circumstance of the contempt being committed "in the face of the House." And the particular point now in question does not seem to have been taken at the bar. In more modern cases the grounds from which the contempt was deduced have always been stated. It was so in *Brass Crosby's Case* (c), though *De Grey C.J.* said there (as appears from *Wilson's* report (d)) that a return stating the breach of privilege generally would be sufficient: but he seems to ground that opinion entirely on *The Earl of Shaftesbury's Case* (a). In *Rex v. Flower* (e) the warrant was special: so were those in *Sir Francis Burdett's Case* (g). Lord *Ellenborough* there intimated that a commitment stated to be for a contempt of either House, generally, would be sufficient (h); but the opinion is thrown out obiter; and he seems to consider Lord *Shaftesbury's Case* (a) an authority for such a form. In the case of *Burdett v. Abbot* (i), in the House of Lords, Lord *Eldon C.* put it to the judges "whether, if the Court of Common Pleas, having adjudged an act to be a contempt of court, had committed for the contempt under a warrant, stating such adjudication generally," and the matter came before the Court of King's Bench on return to a habeas

(a) 6 *How. St. Tr.* 1269. *S. C.* 1 *Mod.* 144.

(b) 1 *Wils.* 299.

(c) 2 *W. Bl.* 754. *S. C.* 3 *Wils.* 188.

(d) 3 *Wils.* 203.

(e) 8 *T. R.* 314.

(g) *Burdett v. Abbot*, 14 *East*, 1.

(h) See pp. 147—150.

(i) 5 *Dow*, 165; 199.

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corpus, setting forth the warrant, that Court would discharge, because the particular facts and circumstances of the contempt were not set forth; and the judges answered in the negative. But, in the case supposed, the Common Pleas would be a court of record acting according to the known course of the common law; the House of Commons is not such a court or so acting; and the Common Pleas, in the case supposed, would be punishing for a contempt *of court*; the House of Commons here professes only to commit for a contempt of the privileges of that House, without shewing what are the privileges which are supposed to have been infringed. If the House may declare its own privilege, as the common law courts declare that law, it should at least, when it punishes for a breach of privilege, point out the privilege violated, so that the law on that subject may be known in future. *Rex v. Hobhouse* (a) is another instance in which the warrant specified the contempt. In *Moore*, 839, several precedents are collected of returns to writs of habeas corpus stating the cause of commitment in general terms; but in every case the prisoner was bailed or discharged (b). It was one of the articles of complaint laid before *Charles I.*, in the Petition of Right (c), that divers persons had “been imprisoned, without any cause shewed; and when for their deliverance they were brought before your justices, by your majesty’s writs of habeas corpus, there to undergo and receive as the Court should order, and their keepers commanded to certify the causes of their

1840.

Case of the
Sheriff of
MIDDLESEX

(a) 2 *Chitt. Rep.* 207.

(b) Collection of precedents of prisoners delivered by habeas corpus on the return: annexed to *Glanville’s case*, *Moore*, 838. In some of these instances, no cause whatever is stated.

(c) See 3 *How. St. Tr.* 222, 223.

detainer;

1840.

Case of the
Sheriff of
MIDDLESEX.

detainer; no cause was certified, but that they were detained by your majesty's special command, signified by the lords of your privy council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law." In the judgment of *Vaughan C. J.* in *Bushell's Case (a)* it is said that the writ of habeas corpus "commands the day, and the cause of the caption and detaining of the prisoner to be certified upon the return, which if not done, the Court cannot possibly judge whether the cause of the commitment and detainer be according to law, or against it. Therefore the cause of the imprisonment ought, by the return, to appear as specifically and certainly to the judges of the return, as it did appear to the Court or person authorised to commit; else the return is insufficient." The House of Commons, then, like other jurisdictions which exercise the power of committing, may be required, on habeas corpus, to shew the particular grounds. And, were this otherwise, the Houses of Parliament might at any time punish offences against the property or servants of individual members, under the name of contempts, as was done formerly (*b*). That the Court now would not suffer this practice to pass unquestioned, though the contempt might be alleged generally on return to a habeas corpus, appears from several passages in the judgment of Lord *Denman C. J.* in *Stockdale v. Hansard (c)*. The decision of the three Judges who differed from *Holt C. J.* in *Regina v. Paty (d)* cannot be considered as having settled the law: this opinion was

(a) *Vaugh.* 135. 137.

(b) See *Stockdale v. Hansard*, 9 *A. & E.* 12, note (*b*); 106, note (*a*).

(c) 9 *A. & E.* 1. Pp. 116, 124, 147, were particularly referred to.

(d) 2 *Ld. Raym.* 1105.

strongly

strongly intimated by Lord *Denman* C.J. in *Stockdale v. Hansard* (a).

1840.

Case of the
Sheriff of
MIDDLESEX.

Thirdly, in point of form, the warrant does not shew a sufficient jurisdiction in those issuing it. It does not recite any direct adjudication that the sheriff has been guilty of a contempt, but only a resolution that the sheriff, "having been guilty of a contempt," &c., "be committed." It does not state that the House authorise or direct the Speaker to issue his warrant. To pass the resolution is not to order the committal. And, lastly, the mandatory part of the warrant requires the Serjeant at arms to keep the sheriff during the pleasure of "*this* House," not shewing, in terms, or by sufficient reference, what house is meant. In *Brass Crosby's Case* (b), *Burdett v. Abbot* (c), and *Hobhouse's Case* (d), the words used were "during the pleasure of *the said* House." No language is used here to shew that the person styling himself "Speaker" is acting in that capacity, or in the course of proceedings in the House of Commons.

No one appeared in support of the return (e).

LORD DENMAN C. J. I think it necessary to declare that the judgment delivered by this Court last *Trinity* term, in the case of *Stockdale v. Hansard* (g), appears to me in all respects correct. The Court decided there that there was no power in this country above being questioned by law. The House of Commons there

(a) 9 *A. & E.* 137, 138. See also the judgment of *Coleridge* J. p. 230. And 14 *East*, 92, note (b), to *Burdett v. Abbot*.

(b) 3 *Wils.* 188.

(c) 14 *East*, 1.

(d) 2 *Chitt. Rep.* 207.

(e) In *Regina v. Paty*, 2 *Ld. Raym.* 1105., and in *Brass Crosby's Case*, 2 *W. B.* 754., it is stated that no counsel appeared to support the commitment.

(g) 9 *A. & E.* 1.

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1840.]

Case of the
Sheriff of
MIDDLESEX.

attempted to place its privilege on the footing of an unquestionable and unlimited power. It was argued, against that claim, that the dicta of learned judges by which it was supported had in many cases been hastily thrown out, and were encountered by others of a contrary tendency from judges not less eminent, and by precedents. I endeavoured to establish that the claim advanced in that case tended to a despotic power which could not be recognised or exist in this country, and that the privilege of publication, as there asserted, had no legal foundation. To all these positions I, on farther consideration, adhere; all of them I believe in my conscience to be true. And if this were not so, it is strange that the case should not have been brought before the other ten judges by writ of error. The House could have suffered no loss of dignity by submitting to them the question which it had already laid before us. In the last resort, a further appeal might have been made to the House of Lords. The efficacy of such an appeal is not to be disputed merely because persons may choose to cast reflections on that body in which, by law, the ultimate decision is vested. That House, too, had an interest (if such motives were supposed to prevail) in upholding a privilege which was claimed for them as well as for the House of Commons. Besides, if our judgment and that of the Exchequer Chamber had been adverse to the plaintiff, it is probable that he would not have acquiesced; and then resort must have been had to the jurisdiction of the House of Lords. In deciding the former case, we looked to the law as our only safe guide, discarding all considerations of supposed expediency; and, under the same guidance, we examine the question now before us.

The

The only question upon the present return is, whether the commitment is sustained by a legal warrant. Three objections have been taken to the warrant, in point of form merely. First, that the words "having been guilty" are no direct adjudication that a contempt has been committed. But in a late case (*a*), where the participle was used in this manner, we considered it as a direct allegation; and it would be childish to suppose that, in a document expressed as this is, the grammatical form objected to could alter the effect. Secondly, it is said that the warrant states only a resolution of the House that a contempt has been committed, but no order given by them to the Speaker. This appears to me unnecessary. We must notice that the Speaker is the officer of the House, and must take it that, when they adjudged a contempt to have been committed, he had full authority from that moment. Thirdly, it is objected that the words "this House," in the latter part of the warrant, are not connected by any reference with the House of Commons before mentioned. But no other house is mentioned in the warrant; and the Serjeant-at-arms certifies in his return that the warrant is under the hand of the Speaker. I cannot for a moment so trifle with a clear and intelligible document as to say that the House of Commons is not meant. It was also observed that the warrant does not allege a contempt of the House, but "a contempt and breach of the privileges of this House." But the same form was used in the cases of Sir *Francis Burdett* (*b*) and Mr. *Hobhouse* (*c*).

The verbal criticisms, therefore, fall to the ground.

(*a*) See *Regina v. Lewis*, 8 A. & E. 881. Also, *Reg v. The Justices of Cambridgeshire*, 4 A. & E. 111.; *Reg v. Milverton*, 5 A. & E. 841.

(*b*) 14 East, 1.

(*c*) 2 Chitt. Rep. 207.

1840.

Case of the
Sheriff of
MIDDLESEX.

The

1840.

Case of the
Sheriff of
MIDDLESEX.

The great objection remains behind, that the facts which constitute the alleged contempt are not shewn by the warrant. It may be admitted that words containing this kind of statement have appeared in most of the former cases; indeed there are few in which they have not. In the *Proceedings upon the case of Jay and Topham* (a), where Sir Francis Pemberton and Sir Thomas Jones were committed by the House of Commons for a judgment as just and reasonable as any ever pronounced, the resolution as to each was, that he, "giving judgment to overrule the plea to the jurisdiction of the Court of King's Bench, in the case between *Jay* and *Topham*, had broken the privileges of the House." I mention this case chiefly for the purpose of correcting a mistake of no small importance. It has been supposed that the resolution to which I have referred was passed by the Convention parliament, and had the sanction of Sir *J. Holt*, as one of the members: but the resolution was passed in *July* 1689 (b); and in *April* of that year *Holt* was made Chief Justice of the King's Bench. In *Brass Crosby's* (c), *Sir F. Burdett's* (d), and *Mr. Hobhouse's* (e) cases, words were used shewing the nature of the contempt. In the *Earl of Shaftesbury's Case* (g) the form was general; and it was held unnecessary to set out the facts on which the contempt arose. That case is open to observation on other grounds; but I think it has not been questioned on this. In *Regina v. Paty* (h) three of

(a) 12 *How. St. Tr.* 821.

(b) *July* 19th. The Convention Parliament was dissolved *February* 6th, 1689-90. 5 *Parl. Hist.* 539. *Ralph's History of England*, vol. ii. 186.

(c) 2 *W. Bl.* 754. *S. C.* 3 *Wils.* 188.

(d) 14 *East*, 1.

(e) 2 *Chill. Rep.* 207.

(g) 6 *How. St. Tr.* 1269. *S. C.* 1 *Mod.* 144.

(h) 2 *Ld. Ray.* 1105.

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the Judges adopted the doctrine of that case to the extent of holding that the Court could not inquire into the ground of commitment, even when expressed in the warrant. *Holt* C. J. differed from them on that point; but he did not question that, where the warrant omitted to state facts, the cause could not be inquired into (*a*). In *Murray's Case* (*b*), which has often been referred to, and recognised as an authority, the warrant was in a general form. There is, perhaps, no case in the books entitled to so great weight as *Burdett v. Abbot* (*c*), from the learning of the counsel who argued and the judges who decided it, the frequent discussions which the subject underwent, and the diligent endeavours made to obtain the fullest information upon it. The judgment of Lord *Ellenborough* there, as it bears on the point now before us, is remarkable. He says (*d*), "If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court, or of any other of the superior courts, inquire further: but if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national (*e*) justice; I say, that in the case of such a commitment, (if it ever should occur, but which I cannot pos-

1840.

Case of the
Sheriff of
MIDDLESEX.

(a) "He said, the cause of the prisoners' commitment being expressed in the warrant, excluded any intendment, that they might be committed for any other cause, than that expressed in the warrant." 2 *Ld. Raym.* 1115.

(b) 1 *Wils.* 299.

(c) 14 *East*, 1.

(d) Page 150. See p. 148: "Upon this case I would observe," et seq. See *Heut. P. C.* book 2. c. 15. s. 73. (vol. iii. p. 219. 7th ed.), which is to nearly the same effect as the passage cited in the text.

(e) Probably a misprint for "natural."

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1840.

Case of the
Sheriff of
Middlesex.

sibly anticipate as ever likely to occur,) we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded." *Bayley J.*, as well as Lord *Ellenborough*, appears in that case to have been of opinion that, if particular facts are stated in the warrant, and do not bear out the commitment, the Court should act upon the principle recognised by *Holt C. J.* in *Regina v. Paty (a)*; but that, if the warrant merely states a contempt in general terms, the Court is bound by it. That rule was adopted by this Court in *Rex v. Hobhouse (b)*; and in the late case of *Stockdale v. Hansard (c)* there was not one of us who did not express himself conformably to it. In the passages which have been cited from my own judgment in that case, as shewing that, if a person were committed for a contempt in trespassing upon a member's property, this Court would notice the ground of committal, I always supposed that the insufficient ground should appear by the warrant. *The Earl of Shaftesbury's Case (d)* has been dwelt upon in the argument as governing the decisions of the courts on all subsequent occasions; but I think not correctly. There is something in the nature of the houses themselves which carries with it the authority that has been claimed; though, in discussing such questions, the last important decision is always referred to. Instances have been pointed out in which the Crown has exerted its prerogative in a manner now considered illegal, and the courts have acquiesced; but the cases are not analogous. The Crown has no rights which it can exercise otherwise than by process of law and through amenable officers: but

(a) 2 *Ld. Ray.* 1105.(b) 2 *Chitt. Rep.* 207.(c) 9 *A. & E.* 1.(d) 5 *How. St. Tr.* 1269. *S. C.* 1 *Mod.* 144.

representative

representative bodies must necessarily vindicate their authority by means of their own; and those means lie in the process of committal for contempt. This applies not to the houses of parliament only, but (as was observed in *Burdett v. Abbot* (a)) to the courts of justice, which, as well as the houses, must be liable to continual obstruction and insult if they were not entrusted with such powers. It is unnecessary to discuss the question whether each house of parliament be or be not a court; it is clear that they cannot exercise their proper functions without the power of protecting themselves against interference. The test of the authority of the House of Commons in this respect, submitted by Lord *Eldon* to the judges in *Burdett v. Abbot* (b), was, whether, if the Court of Common Pleas had adjudged an act to be a contempt of court, and committed for it, stating the adjudication generally, the Court of King's Bench, on a habeas corpus setting forth the warrant, would discharge the prisoner because the facts and circumstances of the contempt were not stated. A negative answer being given, Lord *Eldon*, with the concurrence of Lord *Erskine* (who had before been adverse to the exercise of jurisdiction), and without a dissentient voice from the House, affirmed the judgment below. And we must presume that what any court, much more what either house of parliament, acting on great legal authority, takes upon it to pronounce a contempt, is so.

It was urged that, this not being a criminal matter, the Court was bound, by stat. 56 G. 3. c. 100. s. 3., to inquire into the case on affidavit; but I think the provision cited is not applicable. On the motion for a

1840.

Case of the
Sheriff of
MIDDLESEX.

(a) 14 *East*, 138.(b) 5 *Dow*, 199.

1840.

Case of the
Sheriff of
MIDDLESEX.

habeas corpus, there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer. Seeing that, we cannot go into the question of contempt on affidavit, nor discuss the motives which may be alleged. Indeed (as the courts have said in some of the cases) it would be unseemly to suspect that a body, acting under such sanctions as a house of parliament, would, in making its warrant, suppress facts which, if discussed, might entitle the person committed to his liberty. If they ever did so act, I am persuaded that, on further consideration, they would repudiate such a course of proceeding. What injustice might not have been committed by the ordinary courts in past times, if such a course had been recognised! as, for instance, if the Recorder of *London*, in *Bushell's Case* (a), had, in the warrant of commitment, suppressed the fact that the jurymen were imprisoned for returning a verdict of acquittal. I am certain that such will never become the practice of any body of men amenable to public opinion.

In the present case, I am obliged to say that I find no authority under which we are entitled to discharge these gentlemen from their imprisonment.

LITLEDALE J. I am of the same opinion. I agree with my Lord Chief Justice that the judgment in *Stockdale v. Hansard* (b) is a binding authority. The defendants might have brought that case before a court of error, but have not done so. I still concur entirely in the opinions there delivered. The question before

(a) *Vaugh.* 135. *S. C. Freem. K. B. & C. P.* 1. *Sir T. Jones*, 18.

(b) 9 *A. & E.* 1.

us arises on the return to a writ of habeas corpus. If the warrant returned be good on the face of it, we can inquire no further. The principal objection is, that it does not sufficiently express the cause of commitment; and instances have been cited in which the nature of the contempt was specified. But the doctrine laid down in *Burdett v. Abbot* (a), in this Court and before the House of Lords, sufficiently authorizes the present form. If the warrant declares the grounds of adjudication, this Court, in many cases, will examine into their validity; but, if it does not, we cannot go into such an inquiry. Here we must suppose that the House adjudicated with sufficient reason; and they were the proper judges. As to the verbal objections, I think that "having been guilty of a contempt" is a sufficient averment that the parties were guilty: and, although there is no express statement of an authority to the Speaker to sign the warrant, we must all take notice that there is such a person, and that, by the practice of the House, he is the person to execute a resolution of this kind. Who is to commit the parties in such a case? The House must do it, through the proper officer; and we must take notice that the Speaker is that officer. The expression "this House" might have been ambiguous if any other "house" had been spoken of in the warrant: but no other is mentioned.

1840.

Case of the
Sheriff of
MIDDLESEX.

WILLIAMS J. Any observation on this case from me might have been spared, but for the extent to which the discussion before us has gone, and the circumstances in which the respectable gentlemen making this applica-

(a) 14 *East*, 1.; 5 *Dow*, 165.

1840.

Case of the
Sheriff of
MIDDLESEX.

tion are placed. It was a startling admission in the argument which has been addressed to us, that, for the last century and a half, there have been precedents in favour of this commitment. Recognized precedents have the force of decisions, by which courts, and judges individually, must hold themselves bound. I do not think this Court can suffer any loss of authority by so acting in the present case; but, whatever may be the consequence, we must overlook it when there is an ascertained rule of law before us. If the return, in a case like this, shewed a frivolous cause of commitment, as for wearing a particular dress, I should agree in the opinion expressed by Lord *Ellenborough* in *Burdett v. Abbot* (a), where he distinguishes between a commitment stating a contempt generally, and one appearing by the return to be made on grounds palpably unjust and absurd. The power of committing generally for breach of privilege may be admitted; although, where the privilege is incidentally brought forward, and especially if the House of Commons by plea bring it before us, we cannot avoid judging of it. Then the only point in this case is, whether there be on the warrant an adjudication, in form, of commitment for contempt, which the Court, according to precedent, is bound to recognize. The verbal criticisms I scarcely need notice. The expression "this House" is certain enough, no other having been mentioned; and the authority of the Speaker appears sufficiently from the resolution set forth. It did not appear more fully in *Crosby's Case* (b), *Burdett v. Abbot* (c), or *Rex v. Hobhouse* (d). The only real question is, whether we can interfere because

(a) 14 *East*, 1. 150.(b) 3 *Wils.* 188.(c) 14 *East*, 1.(d) 2 *Chitt. Rep.* 207.

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the ground of commitment is not particularly stated. On this point it is sufficient to cite the judgment of *De Grey* C. J. in *Brass Crosby's Case* (a), which is referred to with approbation by Lord *Ellenborough* in *Burdett v. Abbot* (b). "When the House of Commons adjudge any thing to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment in consequence, is execution; and no court can discharge or bail a person that is in execution by the judgment of any other court" (c). *De Grey* C. J. adds (d) that, the privilege being in that case brought in question directly, and not incidentally, the Court cannot interfere. Whether or not, in the present instance, it was right to visit any person with the anger, or justice, of the House of Commons, is a question with which we have no concern. On grounds of law, the only grounds we have a right to proceed upon, we cannot order these gentlemen to be discharged.

1840.

Case of the
Sheriff of
MIDDLESEX.

COLERIDGE J. I come to my present conclusion with great regret when I consider the circumstances, but with confidence in its justice. As to the former case of *Stockdale v. Hansard* (e), so far as regards the general positions there laid down, I most entirely agree in them, and remain of the same opinion as when it was decided. I formed that opinion with great pains and labour, and a candid attention to the arguments. The part I took in the decision was comparatively small; but the judgment of the Court appears to me perfectly sound: and it would have been better for those dis-

(a) 3 *Wils.* 188.(b) 14 *East*, 1. 148.(c) 3 *Wils.* 199.(d) 3 *Wils.* 202.(e) 9 *A. & E.* 1.

1840.

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Case of the
Sheriff of
MIDDLESEX.

satisfied with it to apply to a court of error, than content themselves with railing against it in terms which neither do themselves credit nor invalidate the decision. The material questions here are, whether the return is bad for not disclosing the particular grounds of the commitment: and whether it is open to an answer by affidavit; or, if it be so, whether there is any case made by the affidavits. Now, first, it is too late to contend that the generality of statement in the warrant is any solid objection. It appears by precedents that the House of Commons have been long in the habit of shaping their warrants in that manner. Their right to adjudicate in this general form in cases of contempt is not founded on privilege, but rests upon the same grounds on which this Court or the Court of Common Pleas might commit for a contempt without stating a cause in the commitment. Lord *Eldon* puts the case in this manner in *Burdett v. Abbot* (a). When a court of competent authority has committed, the commitment is an adjudication, and the grounds of it need not be stated. Secondly, it is a mistake (though I need not dwell upon the point) to treat this as a habeas corpus under stat. 56 G. 3. c. 100. That act was passed to remedy a defect in the common law. I think that the habeas corpus here is at common law: but it is unnecessary to consider that question. It is contended that affidavits may be received to explain the facts returned. But the return states simply an adjudication of contempt. There is nothing in the affidavits referred to which controverts the fact of such an adjudication; and, if the House had jurisdiction to make it, we can no more inquire by affidavit whether they came

(a) 5 Dow, 165. 199.

to a right conclusion in doing so than we could in the case of a like adjudication by the Court of Common Pleas. These gentlemen must, therefore, be remanded. Prisoners remanded.

1840.

Case of the
Sheriff of
MIDDLESEX.

The following case, decided in *Easter* term, 1840, may properly be added here.

STOCKDALE *against* JAMES HANSARD, LUKE GRAVES HANSARD, and LUKE JAMES HANSARD. [Saturday, April 25th, 1840.]

WIGHTMAN moved that proceedings in this cause should be stayed, pursuant to stat. 3 & 4 *Vict.* c. 9. (a). He moved on affidavits of *Frederick Hatton*, clerk to the attorneys for the defendants, who deposed that the action was commenced on 13th *February* last, by summons of that date; that the declaration was filed on 9th *March* last, and interlocutory judgment signed on 18th *March* last: and that no further proceedings had been had. He deposed, also, to having seen the Speaker of the House of Commons sign, on 20th *April* last, a certificate, the original of which was annexed to the affidavit, and which was as follows.

Under stat. 3 & 4 *Vict.* c. 9. s. 1., the Court will stay proceedings in an action, upon a certificate by the Speaker (properly verified), that the publication mentioned in the declaration, (reciting a description of it as therein given), and in respect of which the action is brought, was published by order and under the authority of the House of Commons; the declaration being verified by affidavit, and appearing to be for the publication of an alleged libel, the description

“ In the Queen’s Bench.

“ Between *John Joseph Stockdale* - plaintiff;

“ and

“ *James Hansard, Luke Graves Hansard, and*

“ *Luke James Hansard* - - defendants.

of which corresponds with that in the Speaker’s certificate.

It is not necessary that the certificate itself should further describe the action or declaration.

Quære, whether the declaration need be verified at all.

(a) This act received the royal assent, *April* 14th, 1840.

1840.

STOCKDALE
against
HANSARD.

"I, the Right Honourable *Charles Shaw Lefevre*, Speaker of the House of Commons, by authority of, and pursuant to, a statute made and passed during the present year of the reign of our Sovereign Lady Queen *Victoria*, intituled, 'An Act to give summary protection to persons employed in the publication of parliamentary papers,' do hereby certify that the book and paper respectively mentioned in the declaration in this cause, and therein respectively described as a book of the reports of the inspectors of the prisons of *Great Britain*, and a certain printed paper purporting to be a copy of the reply of the inspectors of prisons for the home district with regard to the report of the court of aldermen to whom it was referred to consider the first report of the inspectors of prisons as far as related to the gaol of *Newgate*, and being the publications in respect whereof this action (such action having been commenced by virtue of a writ of summons bearing date the 13th day of *February* last) hath been commenced and prosecuted, were and are the book of reports and paper published by the above-named defendants by order and under the authority of the House of Commons.

"Given under my hand, in pursuance of the statute in that case made and provided, this 20th day of *April* in the year of our Lord 1840.

"*Charles Shaw Lefevre*,

"Speaker of the said House of Commons."

Hatton further deposed that, on 24th *April* last, he had served both the plaintiff and his attorney, at 2 P.M.(a), with true copies of a notice annexed to the affidavit, dated 24th *April* 1840; which notice was to

(a) This was more than twenty-four hours before the motion was made.

the effect that at 3 P.M. on *Saturday, 25th April* next (this day), or as soon after as counsel could be heard, the defendants intended to bring before the Court the certificate (which the notice described), and the affidavit verifying the same, and that application [would immediately be made to the Court to stay proceedings pursuant to the statute. *Hatton* also verified, upon affidavit, the declaration in the cause, which was annexed to the affidavit, and was a declaration in case, stating that, whereas defendants, on *25th June 1839*, published concerning plaintiff, in a certain book purporting to be reports, &c. (as in the Speaker's certificate), matter set out in the declaration, and which the plaintiff alleged not to be true, yet defendants published, concerning plaintiff, in a certain printed paper, purporting &c. (as in the Speaker's certificate), other matter (*a*), which was set out in the declaration and alleged to be libellous.

1840.

STOCKDALE
against
HANSARD.

Platt proposed to shew cause in the first instance, which he contended that he was entitled to do, as the statute (sect. 1) required that twenty-four hours' notice should be given to the plaintiff. [Lord Denman C. J. We may as well hear you: though I doubt whether you can insist upon it. It may be that the notice was prescribed only to enable plaintiffs to avoid incurring more costs.] The certificate shews nothing as to the nature of the declaration or action. It might be for goods sold and delivered. It appears only that the book and paper are "mentioned" and "described" in the declaration, and speaks of the publications "in respect whereof" the action is commenced. [Lord Den-

(a) The matter referred, though not in direct terms, to the book first mentioned.

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1840.
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 STOCKDALE
 against
 HANNAH.

man C. J. The declaration is verified.] It should appear that the Speaker, who makes the certificate, has seen it; and this ought to be shewn in the certificate itself. Further, the statute does not apply to cases where judgment has been suffered by default (*a*).

Wightman and *Crompton*, *contra*, were stopped by the Court.

LORD DENMAN C. J. The act is imperative; and it has been complied with. The certificate speaks of an action commenced on the 13th of *February*. Whether it was necessary to verify the declaration we need not decide; for that has been done. The Speaker must have satisfied himself as to the nature of the proceedings.

LITLEDALE, PATTESON, and COLERIDGE Js. concurred.

Rule absolute (*b*).

(*a*) This fact did not expressly appear.

(*b*) The rule was as follows,

"Upon reading the affidavit of *Frederick Hatton*, and the certificate of the Right Honourable *Charles Shaw Lefevre*, Speaker of the House of Commons, thereto annexed, another affidavit of the said *Frederick Hatton*, and the paper writing thereto annexed; and upon hearing *Mr. Platt* of counsel for the plaintiff, and *Mr. Wightman* of counsel for the defendants: it is ordered that proceedings in this cause be stayed."

The above action was brought in *Hertfordshire*. A similar order was made this day in an action between the same parties, brought a few days earlier in *Middlesex*; the only difference between the two cases being that, in the action last mentioned, notice of a writ of inquiry of damages had been given.

1840.

HODSOLL *against* STALLEBRASS and Another.Saturday,
January 11th.

DECLARATION in case, alleging that defendants, viz. on 11th *March* 1839 &c., kept a dog, well knowing him to be accustomed to bite mankind, which dog afterwards, and while so kept by defendants, viz. on &c., by reason of the premises, bit *James Young*, then and still being plaintiff's apprentice and servant, and lacerated two of his fingers and his right hand and arm, insomuch that, by reason thereof, he became sick &c., and so continued for a long &c., viz. from thence until the commencement of this suit, during all which time *J. Y.* was and continued unable to do his duty as such servant and apprentice, and as such servant and apprentice to serve and assist plaintiff in his trade of a watchmaker (which plaintiff then carried on), as *J. Y.* otherwise would have done, and in the way of which said trade and business *J. Y.* had before been, and was before then duly apprenticed to plaintiff by indenture, viz. of *July* 9th 1836, for a certain term, viz. from thence until the said *J. Y.*, who was of the age of thirteen years on 1st *August* 1835, should accomplish his full age of twenty-one years; and plaintiff thereby not only lost the service of his said servant and apprentice &c., but was obliged to pay money &c., viz. &c., in and about hiring another person, viz. *W. E.*, to serve him &c. instead of *J. Y.* during the time aforesaid, and in and about endeavouring to cure his said servant &c. "And the plaintiff further saith that, by means of the premises, the said fingers and hand and arm of the said *J. Y.* have become and are permanently crippled and hurt and rendered unfit

In an action of tort for wounding plaintiff's servant, whereby he was disabled from serving, the jury may give damages for the loss of service, not only before action brought but afterwards, down to the time when, as it appears in evidence, the disability may be expected to cease.

A declaration for such injury, stating the servant to have been *permanently* crippled, is supported by evidence that the injured part is still disabled and likely to remain so, but, with care, will be restored in time.

for

1840.

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 HODSOLL
against
 STALLEBRASS.

for use, and the general health of the said *J. Y.* hath become and is greatly injured and impaired, and the said *J. Y.* will never again be capable of working at the said trade and business of a watchmaker as he otherwise might and would have done; and the plaintiff will thereby lose all benefit and advantage which he might and would otherwise have received and acquired from the future service and assistance of the said *J. Y.* as such servant and apprentice as aforesaid, from thenceforth until the end and expiration of his said apprenticeship; and he, the plaintiff, having in and by the said indenture of apprenticeship covenanted and agreed to find, provide, and allow unto the said *J. Y.*, his said servant and apprentice, competent and sufficient meat, drink, and apparel," &c., "during all the term aforesaid, will remain liable so to do until the end and expiration of the said term, notwithstanding he may hereafter receive little or no benefit from the service and assistance of the said *J. Y.* as such servant and apprentice as aforesaid in his the plaintiff's said trade and business, in consequence of the wounds and injuries aforesaid occasioned as aforesaid," &c.

Plea: 10*l.* paid into Court, with averment that plaintiff hath not sustained damages beyond 10*l.* in respect of the causes of action in the declaration mentioned. Verification. Replication: damages ultra, in respect &c. Issue thereon.

On the trial before Lord *Denman* C. J., at the sittings in *London* after last *Michaelmas* term, the injury complained of was proved; and it appeared that the apprentice had been ever since, and still was, so far disabled by it in his hand and arm that the value of his services to the plaintiff was greatly diminished, and was
 likely

likely to continue so for some time longer; but a surgeon stated that, with proper treatment, the injured parts would in time be restored. The Lord Chief Justice left it to the jury, first, to say what damage the plaintiff had suffered from the time of the injury until that of his commencing the action; and, secondly, to estimate his damage for the remaining time during which he would be a loser by the state of the apprenticeship. The jury estimating the damage before action brought at 10*l.* (the sum paid into Court), and the subsequent damage at 20*l.*, his Lordship reserved leave to move to enter a verdict for the defendant, if the Court should be of opinion that the latter head of damage ought not to have been taken into account; and the plaintiff had a verdict for 20*l.*

1840.

HODSOLL
against
STALLEBRASS.

Erle now moved according to the leave reserved. The damage after action brought should not have been left to the jury. This is decided by *Hambleton v. Veere* (a). The plaintiff there declared for the seduction of his apprentice, whereby it was alleged that plaintiff lost the apprentice's services for all the residue of the term covenanted for in the indentures; and, damages having been assessed generally, but it appearing by the record that the term of apprenticeship had not yet expired, judgment was arrested. Mr. Serjt. *Williams* says, in his note to that case (b), "Where it is positively and expressly averred in the declaration, that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury

(a) 2 *Saund.* 169.(b) 2 *Wms. Saund.* 171 b. note (1).

1840.
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 HODSOLL
 against
 STALLERBASS.

give entire damages, judgment will be arrested." The declaration here states a permanent injury; to bear out that allegation it should have been ascertained and proved that the servant never would recover the use of his hand. But that was negatived. [*Coleridge J.* Suppose the plaintiff's own hand had been injured, not so that it would never recover, but that he would not regain the use of it for a long time: would not he be entitled to sue for the whole future damage?] That might be a different case. Here the act is not done to himself; his ground of complaint is the resulting damage; and for that he can only bring his action from time to time, when special damage accrues. For instance, if he has to pay another workman, he can recover only when he has had to pay the wages; and a fresh cause of action will accrue each time. [*Little-dale J.* Your argument is against the principle that there should be an end of litigation.] In covenant against an apprentice for leaving his master before the time, whereby the master lost his service for the term (which had not yet expired), the declaration was held sufficient on demurrer to the plea, because the plaintiff might take damages from the departure only: *Horn v. Chandler* (a). Had general damages been taken, the judgment would clearly have been arrested. [*Little-dale J.* There a fresh cause of action arose every day; here only a fresh damage arises.] When that happens, there is a new cause of action. In *Malachy v. Soper* (b), which was an action for slander of title to mining shares, *Little-dale J.* held that, the action being grounded on special damage, by loss on the value of the shares in

(a) 1 *Mod.* 271.

(b) *S. C.* in banc (not on this point), 3 *New Ca.* 371.

consequence

consequence of the slander, damages could not be claimed for injury sustained after the action was commenced. In actions of contract the plaintiff may recover interest accruing after action brought: but there a second action could not be brought for the breach of contract which is the foundation of the suit: those cases, therefore, differ from the present.

1840.

HODSOLL
against
STALLERMAN.

LITLEDALE J. There is no ground for this application. The allegation of permanent damage in the declaration was not negatived. It was satisfied if the plaintiff gave proof of an injury likely to last six months; as a party may allege a total loss, and recover for a partial one. Then as to the estimate of damages; they might be given prospectively, because the damage arose from the injury done at the time specified in the declaration. The damage so arising was not the sole cause of action; the injury and the damage together were the cause. In *Malachy v. Soper* (a) prospective damages could not be given, because the jury could not say prospectively what fluctuation might take place in the value of shares: they could consider only the damage sustained down to the time of action brought. In *Hambleton v. Veere* (b) the apprentice might have returned after action brought. So, in the other case cited, the damage might have been lessened at any time subsequent to the action. But here the jury find a permanent injury. It is argued that a fresh action might be brought from time to time; but that is not so, the action being founded, not upon the damage only, but upon the unlawful act, and the damage. Without the

(a) *S. C.* in banc (not on this point), 3 *New Ca.* 371.

(b) 2 *Saund.* 169.

1840.

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HODGOLL
against
STALLERMAN.

special damage this action would not be maintainable at the plaintiff's suit. A fresh action could not be brought unless there were both a new unlawful act and fresh damage. The complaint is of a tortious act, *per quod servitium amisit*.

COLERIDGE J. (*a*). Mr. *Erle* does not deny that, if the action had been for an injury to the master's own person, he might have recovered for future damage. In that case the allegation of permanent injury would have been borne out by the evidence here given; and there is no material distinction between such a case and the present. The argument here, that the complaint is grounded, not on the act, but on the resulting damage, is a fallacy. The action is for the two united.

Lord DENMAN C. J. The evidence here was, that the servant would not recover the use of his hand for a considerable time; that supported the allegation of a permanent injury. The note to *Hambleton v. Veere* (*b*) says that, in actions of trespass and tort, new actions may be brought "as often as new injuries and wrongs are repeated;" not as often as new damage accrues.

Rule refused (*c*).

(*a*) *Williams J.* was on the special commission at *Monmouth*.

(*b*) 2 *Wms. Saund.* 171. *b.* note (1).

(*c*) See *Roberts v. Read*, 16 *East*, 215.; *Gillon v. Boddington, Ry. & M.* 161.; *Wordsworth v. Harley*, 1 *B. & Ad.* 391.



1840.

DOE on the demise of HIGGINBOTHAM *against* Monday,
BARTON and Warburton. January 13th.

EJECTMENT for messuages and lands in *Cheshire*.

On the trial before *Alderson B.*, at the *Cheshire* Summer assizes, 1837, the lessor of the plaintiff proved that *Matthew Morton*, being seized in fee of the premises in question, let a part, in *August* 1826, to the defendant *George Barton*, as tenant from year to year. By lease and release of 20th and 21st *March* 1829, *Morton* assigned all the premises, by way of mortgage, to *Thomas Higginbotham*, the lessor of the plaintiff. Afterwards *Barton*, upon demand made by the lessor of the plaintiff, paid the rent to him from time to time, the first of such payments being made in *September* 1831, and the last in *January* 1835. The lessor of the plaintiff demised the part not let to *Barton* to *Elizabeth Bullock*, as tenant from year, in 1833; and she paid the rent to him from thence till *September* 1834, inclusively. She afterwards underlet to the defendant *John Warburton*. In 1835, both *Barton* and *Bullock* refused to pay the rent to the lessor of the plaintiff: and he duly served notices to quit (a).

M., being seized in fee of land, mortgaged to *O.*, but remained in possession, and afterwards demised part for a term to *B.*, who also entered; after which *M.* mortgaged to *H.* *H.* after this received rent from *B.*, and demised the other part to *A.* Afterwards *B.* and *A.*, on notice from *O.*, paid *O.* rent. *H.* then brought ejectment (after notice to quit) against *B.* and *A.*

Held that *B.* and *A.* might both shew, in defence, the first mortgage to *O.*, *O.*'s notice to them, and their payment of rent to *O.* For

That, al-

though *B.* could not dispute *M.*'s title at the time of the demise, he might shew that *H.* had no derivative title from *M.*, and he was not precluded by having paid rent to *H.* under a mistake of the facts.

That *A.*, by shewing that *M.*, at the time of the demise to him, was only mortgagor in possession, did not impugn *M.*'s right to confer upon him, by the demise, a legal title to the possession, but might shew that *M.* had since been treated as a trespasser by the mortgagee, so as to determine *M.*'s right: And that *O.*'s notice to the tenant to pay him the rent might, if received in evidence, tend to shew that by so doing *O.* treated the mortgagor as a trespasser.

(a) It was suggested that the consent rule cured any ejection arising from the defendants occupying separate parcels.

1840.
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 DOB dem.
 HIGGINBOTHAM
 against
 BARTON.

In answer, the counsel for the defendant offered to prove that *Morton* had, by lease and release of 19th and 20th *February* 1821, mortgaged the premises in question to *Thomas Marriott* in fee, but had remained in possession; and that, by lease and release of 11th and 12th *November* 1835, *Marriott* had conveyed the same premises to *George Woodhead* in fee; and that *Woodhead* afterwards gave notice to the tenants to pay him the rents, and received them accordingly. The learned judge was of opinion that the defendants were estopped from this defence, and rejected the evidence. In *Michaelmas* term, 1837, *Jervis* obtained a rule for a new trial. In *Trinity* term last (a),

Evans and *Welsby* shewed case. The defendant *Barton* cannot set up the prior mortgage, because the effect of such a defence would be to deny that *Morton*, from whom *Barton* took as tenant, had a right to demise. The supposed mortgage to *Marriott*, if it proved any thing, proved that *Morton* was not legal owner at the time of the demise to *Barton*. Then, if *Barton* be estopped as against *Morton*, he is estopped as against *Morton's* assignee, the lessor of the plaintiff. And the notice by *Woodhead*, *Marriott's* assignee, had not, of itself, the effect of making *Barton* tenant to *Woodhead*; *Evans* v. *Elliot* (b). The defendant *Warburton* is in the same position as *Bullock*; and *Bullock*, having been let into possession, as tenant, by the lessor of the plaintiff, cannot dispute that the latter had a right to demise; but the mortgage to *Marriott* would

(a) *Friday*, June 7th, 1839. Before Lord Denman C. J., *Littleclark*, *Patteson*, and *Coleridge* Js.

(b) 9 A. & E. 342.

be merely evidence in derogation of the legal title of the lessor of the plaintiff at the time of the demise.

1840.

DOE dem.
HIGGINBOTHAM
against
BARTON.

Jervis and *E. V. Williams* contra. Although a tenant cannot dispute that his landlord had a right to demise, he may shew that the landlord's title has expired since the demise. Now *Woodhead* claims under the mortgage of 1823. After that mortgage, *Morton* had only an equity of redemption in the inheritance; he held by the permission of the mortgagee; and the lessor of the plaintiff had no greater estate. *Woodhead* might, by notice, have treated either *Morton* or the lessor of the plaintiff as a trespasser; he could therefore determine the estate of the defendants, who claimed only under a demise from the mortgagor. *Evans v. Elliot* (a) shews only that the mortgagee could not, by mere notice, make the tenants of the mortgagor tenants to himself upon the terms of the original demise to them, against their will, so as to entitle himself to distrain under such demise. That does not prove that he cannot treat the mortgagor, and all claiming under the mortgagor by a conveyance subsequent to the mortgage, as trespassers. Here the mortgagee gives the tenants notice of his title; and they acquiesce and pay rent accordingly. *Pope v. Biggs* (b) goes farther than the defendants' case requires. There *Bayley* J. said, "I have no doubt, that in point of law, a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and that

(a) 9 A. & E. 342.

(b) 9 B. & C. 245.

1840.

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 DOR DEM.
 HIGGINBOTHAM
 against
 BARTON.

payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents. It is undoubtedly a well established rule, that a lessee cannot dispute the title of his lessor at the time of the lease, but he is at full liberty to shew that the lessor's title has been put an end to. There is another rule of law, viz. that the mortgagor cannot dispute the title of the mortgagee. When the mortgagor occupies the premises, he holds under the mortgagee, who may put an end to the rights of the mortgagor." The qualification which this doctrine has received from *Evans v. Elliot* (a) does not affect the present question. In that case it was said that "the tenant's attornment is at least necessary to create" the relation of tenant and landlord between the tenant and the mortgagee. Here the notice is followed by the acquiescence of the tenant: and that determines the relation between the tenant and the mortgagor. The lessor of the plaintiff has no legal title. *Whitton v. Peacock* (b) shews that, even if he had afterwards acquired the legal title, the antecedent lease would not have been so far made good as to enable the assignee of the reversion to sue the tenant on the covenants. In *Neave v. Moss* (c) a tenant for life, with power to lease for twenty-one years, leased for fifty-three, and died: after his death, and more than twenty one years from the making of the lease, the lessee underlet: after which the remainder-man gave both the lessee and the underlessee notice to quit, and then

(a) 9 A. & E. 342.

(b) 2 New Ca. 411.

(c) 1 Bing. 360.

leased

leased to the underlessee anew, and received rent from him : subsequently, and within the fifty-three years, the first lessee distrained on the underlessee, and avowed under the lease which he had granted : and it was held that the underlessee might plead non tenuit to such avowry, because he was entitled to shew that his lessor's title had expired. So, here, both *Barton* and *Warburton* may shew that the title of *Morton*, and all claiming through him, has been put an end to by *Morton's* mortgagee. It is true that, where a party who has no title makes a lease, the lessee is estopped from alleging his want of title : but, if the lessor has any title, the lease shall not work by estoppel, but shall enure to the extent of the title, and no further (a). [Patteson J. The rule is, that a deed which can take effect by interest shall not be construed to take effect by estoppel.] Here *Morton* had an interest, though defeasible. Whatever the precise legal nature of the mortgagor's estate is, he clearly holds by leave of the mortgagee, and only so long as the mortgagee chooses to permit. [Patteson J. It is very difficult to say what the mortgagor's estate is (b).]

1840.

DOE dem.
HIGGINBOTHAM
against
BARTON.

Cur. adv. vult.

Lord DENMAN C. J., in this term (January 13th), delivered the judgment of the Court.

In this case the facts were as follows. One *Morton*, being seised in fee in the premises in question, mortgaged them to one *Woodhead* in 1821. *Morton* remained in possession, and, in 1829, mortgaged the

(a) See *Co. Lit.* 45 a., 47 b.

(b) See judgment of *Patteson J.* in *Doe dem. Jones v. Williams*, 5 A. & E. 297.

1840.
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 Doe dem.
 HIGGINBOTHAM
 against
 BARTON.

same premises to the lessor of the plaintiff. Between the years 1821 and 1829, *Morton* had demised to *Barton* the premises which he holds. After 1829, the lessor of the plaintiff received rent from *Barton*, and himself demised the rest of the premises to a *Mrs. Bullock*, under whom *Warburton* the other defendant claimed. In 1835, *Woodhead* gave both the defendants notice to pay the rent to him; and they did so. The lessor of the plaintiff afterwards gave the defendants notice to quit, and brought this ejectment.

At the trial, the above facts, so far as regards the mortgage to *Woodhead*, the notice by him, and the payment of rent to him, did not appear. The defendants' counsel offered to prove them: but the learned Judge held the evidence inadmissible, by reason of the rule that a tenant shall not dispute his landlord's title. The defendants then and now contend that this evidence does not amount to disputing that the lessor of the plaintiff (assuming him to have been their landlord) ever had title, but, on the contrary, shews that he had a defeasible title, and that such title has been defeated: and this they contend they are at liberty to prove.

Supposing the facts to be as above stated, it is clear that the lessor of the plaintiff never had any legal estate; and he must rely on the rule with regard to landlord and tenant. That rule is fully established: viz. that the tenant cannot deny that the person by whom he was let into possession had title at that time; but he may shew that such title is determined; *Doe dem. Knight v. Lady Smythe (a)*. With respect to the title of a person to whom the tenant has paid rent, but

(a) 4 M. & S. 347. See *Doe dem. Marriott v. Edwards*, 5 B. & Ad. 1065.; *Doe dem. Bullen v. Mills*, 2 A. & E. 17.; *Doe dem. Willis v. Birchmore*, 9 A. & E. 662.

by

by whom he was not let into possession, he is not concluded by such payment of rent, if he can shew that it was paid under a mistake.

These defendants therefore stand in different situations.

Warburton is precluded from denying that the lessor of the plaintiff ever had a title, and must shew that such title as he had is determined.

Barton is precluded from denying that *Morton* had a title; but he is at liberty to deny that the lessor of the plaintiff ever had any derivative title from *Morton*, unless the payment of rent concludes him. We do not think that he is so concluded, because, he being tenant to *Morton*, and having notice of a subsequent mortgage by *Morton* to the lessor of the plaintiff, had no right to question it, nor, until he received notice from *Woodhead* of the prior mortgage, had he any reason to doubt that the legal estate had passed to the lessor of the plaintiff. He may truly be said to have paid the rent under a mistake; and then he may shew, not that *Morton* had not a title by which he *Barton* would be estopped as against *Morton* himself, but that *Morton's* title was not such a one as would enable him to pass a legal estate to the lessor of the plaintiff. If the evidence had been received, he would have shewn that *Morton* had only the equity of redemption, and that nothing more passed to the lessor of the plaintiff from *Morton*. And this we think he was at liberty to shew; though, if there had been a demise in the declaration by *Morton* himself, it might have been otherwise. As to *Barton*, therefore, we are of opinion on this ground that there must be a new trial.

As to *Warburton*, he is bound to admit that the

1840.

—
Dox dem.
HIGGINBOTHAM
against
BARTON.

1840.
 ———
 DOR dem.
 HIGGINBOTHAM
 against
 BARTON.

lessor of the plaintiff had a title when he (*Warburton*) was let into possession. In truth, the lessor of the plaintiff was mortgagor in possession (for he can be in no better situation than *Morton*); and, if the notice from *Woodhead* to the tenants to pay rent to him determined the title of the lessor of the plaintiff, doubtless the evidence ought to have been received.

Suppose the lessor of the plaintiff had been tenant *pur auter vie*, no doubt the death of *cestui que vie* might have been shewn. Suppose he had been tenant from year to year to *Woodhead*, no doubt *Warburton*, his under-tenant, might have shewn a notice to quit from *Woodhead* to the lessor of the plaintiff. Suppose he had been strictly tenant at will to *Woodhead*, no doubt *Warburton* might have shewn the determination of that will on the part of *Woodhead*. Now it is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other, in any other terms than those very words: but thus much is established by the cases of *Partridge v. Bere* (a) and *Hitchman v. Walton* (b), that the mortgagee may treat the mortgagor as being rightfully in possession and himself as reversioner; so that, as long as he be not treated as a trespasser, his possession is not hostile to nor inconsistent with the mortgagee's right. (We purposely avoid the expression "is not adverse," by reason of the statutes 3 & 4 W. 4. c. 27. and 7 W. 4. & 1 Vict. c. 28.).

The tenant, therefore, may be said to satisfy the rule, when he admits that, at the time when he was let into possession, the person who so let him in was mortgagor

(a) 5 B. & Ald. 604.

(b) 4 M. & W. 409.

in possession, not treated as a trespasser, and so had title to confer on him, the tenant, the legal possession; and yet may go on to shew that subsequently he has been treated as a trespasser, whereby his (the mortgagor's) title, and the tenant's rightful possession under him, have been determined.

If this view be correct, then the remaining question will be whether *Woodhead*, by giving notice to the tenants to pay rent to him, has treated the mortgagor as a trespasser. We feel considerable doubt on this point, as it does not appear whether the defendants were prepared to shew any communication between *Woodhead* and the lessor of the plaintiff or *Morton*; but we think that the rule should be absolute for a new trial, because, as all evidence was excluded, it is not possible to say that the effect of it, if received, might not have been to establish the fact distinctly, that *Woodhead* had treated the lessor of the plaintiff as a trespasser.

In coming to this conclusion, we are not obliged to examine any of the recent decisions in respect to the rights of mortgagees and mortgagors: for it is conceded on all hands that, where a lease is made by the mortgagor subsequently to the mortgage, and the mortgagee afterwards requires the rent to be paid to him, and it is paid accordingly, as here, the relation of landlord and tenant may arise between the parties. Or, at all events, the mortgagee may be entitled to sue the tenant for use and occupation. Therefore, under the circumstances of this case, it is plain that *Woodhead* was entitled to the profits of the land, and the defendants were right in paying him those profits, whether strictly called rent or not. He might have ejected them, and afterwards let to them: and it seems absurd to require him to go through the

1840.

DOX dem.
HIGGINBOTHAM
against
BARTON.

1840. the form of an ejectment, in order to put them into the very position in which they now stand.

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Dor dem.
HIGGINBOTHAM
against
BARTON.

Still, if the rule with respect to landlord and tenant were really infringed by dispensing with the form of an ejectment, we should be most unwilling to dispense with it. But, for the reasons above stated, we do not think that it is infringed; and are of opinion that the rule for a new trial should be made absolute.

Rule absolute.

Tuesday,
January 14th.

The QUEEN *against* The Company of Proprietors of the Canal Navigation from LEEDS to LIVERPOOL.

A canal company were empowered by statute (10 G. 3. c. 114.) to purchase lands, or to take from unwilling owners upon making compensation.

The contracts, sales, &c., were to be enrolled, with the clerk of the peace for the county, at the expence of the company; true copies to be evidence in all courts. The lands were to be vested in the company upon the payment or tender of the sums contracted for or assessed as compensation.

CRESSWELL had obtained a rule in last *Trinity* term, calling upon the defendants to shew cause why a mandamus should not issue, commanding them to enrol with the clerk of the peace for the county of *Lancaster*, and the town clerk of the borough of *Liverpool*, respectively, as the case might require, all contracts, agreements, sales, conveyances, and assurances, relating to the purchase, sale, or disposition, for the use of the above navigation, of any lands or grounds heretofore forming part of the estate of *Joseph Scarisbrick*, deceased, and of *Charles Scarisbrick*, or either of them.

A land owner applied for a mandamus requiring the company to enrol all contracts, &c., relating to certain lands which had been taken by them from his estate; alleging that, at a late trial between himself and the company, it had been material for him, in order to avail himself of privileges conferred by the statute, to prove that the company had taken lands from his estate, and that he had incurred great expence in procuring secondary evidence, for want of enrolment of a contract which, he was informed and believed, had been made under the circumstances in which enrolment was prescribed by the statute.

It appearing that the company had been in undisturbed possession of the lands in question for sixty-five years, the Court refused a mandamus.

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The company were constituted a corporation by sect. 1 of stat. 10 G. 3. c. 114., "for making and maintaining a navigable cut or canal from *Leeds* bridge, in the county of *York*, to the *North Lady's Walk* in *Liverpool*, in the county palatine of *Lancaster*, and from thence to the river *Mersey*." The same section empowers the company to purchase lands for the use of the navigation, to make the canal and works, to enter lands for the purpose, making satisfaction, &c.

Sect. 7 empowers all bodies politic, &c., and all other persons, seised, possessed of, or interested in any lands set out for the canal (by the company, under sect. 5), to contract for, sell, and convey to the company, or their nominees and appointees, the lands so set out; "and where, by making the said cut or canal, the property of any land-owner shall be separated into small parcels, so as to render the occupation thereof inconvenient, it shall and may be lawful to and for such bodies politic," &c., and other land-owners, by the consent of certain commissioners, "to be testified by any writing or writings to be by them sealed and delivered in the presence of, and attested by two or more credible witnesses, to contract for, sell, and dispose of, or to convey in exchange in lieu of other lands, all or any part of such lands or grounds through which the said intended cut or canal shall be made, to any person or persons whomsoever, for such price or prices in money, or other equivalent, as to the said commissioners" &c. "shall seem reasonable; and that all such contracts, agreements, sales, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatsoever;" "and that all such contracts, agreements, sales, conveyances, and assurances, other than those which concern
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1840.

The QUEEN
against
The
LEEDS and
LIVERPOOL
Canal
Company.

1840.

The QUEEN
against
The
LEEDS and
LIVERPOOL
Canal
Company.

any purchase or exchange between any such respective land-owners (so to be made as aforesaid), shall, at the expense of the said company of proprietors, be inrolled with the register for the West Riding of the said county of *York*, the clerk of the peace for the said county of *Lancaster*, and the town clerk of the borough of *Liverpool* aforesaid respectively, as such contracts, agreements, sales, conveyances, and assurances may relate to any lands or grounds within the said counties and borough respectively, and as the case shall require; and true copies thereof shall be allowed to be good evidence in all courts whatsoever; for which inrolment, or copy thereof, shall be taken the sum of 3*d.* for every 200 words, and so in proportion for any greater or less number of words, and no more."

Sect. 9 provided that, in case of differences arising between the company and owners of lands touching the purchase-money, certain commissioners should, with the consent of the parties, determine and adjust the sums to be paid; and that, if the parties should refuse to submit the matter to the determination of the commissioners, or should be dissatisfied with any determination made by them, or should be incapable of treating, &c., the sums to be paid should be assessed by a jury as therein specified.

Sect. 15 enacted that, upon payment of such sums as should be contracted and agreed for between the parties, or determined and adjusted by the commissioners, or assessed by the juries, or tender thereof, the lands, and the fee-simple and inheritance thereof, should be vested in, and become for ever the sole property of, the company.

Sect. 47 granted to the company certain tolls on the canal,

canal, for commodities conveyed thereon, with a diminished tonnage for soap ashes, &c., to be used for manuring the lands of any person whose lands should be cut through by the canal, such lands lying in any township through which the canal should pass.

Sect. 48 exempted from tolls all dung, &c., for the improvement only of the lands in the township, &c., through which the canal should pass, of all persons whose lands should be taken for making the canal.

This application was made on behalf of *Charles Scarisbrick*, who deposed that he was the owner of an extensive landed estate in the township of *Scarisbrick*, in *Lancashire*, and that the canal passed and cut through the said estate; and that he was informed, and verily believed, that the land now formed into the canal, during the whole length of its passing through the estate, formed, before the making of the canal, part of a landed estate belonging to *Joseph Scarisbrick*, deceased, the residue whereof was the said estate of *Charles Scarisbrick*; and that the company] purchased, took, and had, by means of some contract, agreement, sale, conveyance, or assurance in writing, the said portion of land so formed into a canal, from *Joseph Scarisbrick*, under their statutory powers; that portion, and the deponent's present landed estate, having at the time of such purchase formed one estate. Other affidavits stated that, on the trial of a late cause, in which *Charles Scarisbrick* was plaintiff and the company defendants, it was material to give in evidence copies of any contracts, &c., of the nature suggested, which had been inrolled with the clerk of the peace for *Lancashire*: that Mr. *Scarisbrick's* attorney searched at the office of the clerk of the peace, but could not find, and verily believed

1840.

—
The QUEEN
against
The
LEEDS and
LIVERPOOL
Canal
Company.

1840.

—
The QUEEN
against
The
LEEDS and
LIVERPOOL
Canal
Company.

believed that there had not been, any such enrolment. That the attorney had required the company forthwith to make the enrolment; which, however, it appeared on search that they had not done before the trial; and that Mr. *Scarisbrick* had been compelled, at much expense and inconvenience, to supply secondary evidence. The affidavits also shewed a subsequent demand and refusal.

In answer, the attorney for the company made affidavit that the canal passed through fifty townships or parishes; that the part of the canal in question had been completed in or before 1774, and that the company, ever since that time, had been in quiet and uninterrupted enjoyment thereof that the parties who had the management of the concerns of the company at the time of making the canal were accustomed sometimes to make verbal contracts for the lands to be taken, and to take possession thereof without any formal conveyance; that, at this distance of time, it was extremely difficult to ascertain in what cases there were written contracts, or to identify the portions of land taken from various proprietors, and that it had been considered that the lands vested absolutely in the company upon payment of the purchase-money. That, upon diligent search, he, the attorney, could not find that the provision for enrolment had been acted upon in a single instance; and he did not believe that any application to that effect had ever been made to the company. That, according to the practice of the office of the clerk of the peace for *Lancashire*, it was not practicable to enrol there any deed, contract, or other assurance, without the appearance of one of the attesting witnesses before the clerk of the peace and two magistrates of the county, to verify such deed, &c. And that, according to the usual practice of the

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the Court of Chancery, and other superior courts of record at *Westminster*, before deeds or documents could be enrolled, the due execution thereof was required to be proved or acknowledged by one of the parties executing the same, before a master, or a judge, or other person duly authorised, of the said courts respectively.

1840.

—
The QUEEN
against
The
LEEDS and
LIVERPOOL
Canal
Company.

Sir *F. Pollock* (with whom were *Atcherley* Serjt., *Wightman*, and *Baines*) now shewed cause. The company have had the land in question sixty-five years, and cannot now be called on to enrol the supposed contract by which they obtained it. The witnesses and parties cannot be produced for the purpose of fulfilling the forms of enrolment. (He was then stopped by the Court).

Cowling contra. There is no limitation barring an application for a mandamus. In *Rex v. Stainforth and Keadby Canal Company* (a) a mandamus was refused where the party had not applied in reasonable time; but there it was said that the party had another remedy. Here there is no remedy but mandamus. [*Coleridge* J. What is the evil which you want to cure?] It is important that the persons whose lands have been taken should have evidence of the fact. Sects. 47 and 48 give those parties certain privileges as to the tonnage; and the action referred to in the affidavit arose on a question as to sect. 48, in which Mr. *Scarisbrick* required the evidence against the company; and the enrolment is expressly made evidence. The company, at whose expense the enrolment was to be made, are now availing

(a) 1 M. & S. 32.

1840. themselves of their own neglect in not enrolling. The enrolment may be made at any time.

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The QUEEN
against
The
LEEDS and
LIVERPOOL
Canal
Company.

Lord DENMAN C. J. The act was passed in 10 G. 3., and we are now in 3 Vict. After the company have held the land for sixty-five years, I think they cannot be called on to make the enrolment.

LITTLEDALE and COLERIDGE Js. concurred (a).

Rule discharged (b).

(a) *Williams J.* was on the special commission at *Monmouth*.

(b) See *Rex v. The Commissioners under the Cocker-mouth Inclosure Act*,
1 B. & Ad. 378.

Tuesday,
January 14th.

GRIFFITS *against* IVERY.

On an issue as to defendant's signature, witnesses were called for him who deposed that they knew his handwriting and did not believe the signature to be his. Plaintiff proposed to ask each witness whether a paper, placed on the witness box, was signed by defendant, purposing, by such enquiry, to test the knowledge of the witnesses by their agreement or disagreement. The paper was not in evidence for any other purpose: Held, that such enquiry was not allowable.

ASSUMPSIT, by indorsee against acceptor, on two bills of exchange. The defendant paid money into Court on the first bill, and, as to the second, pleaded that he did not accept. The plaintiff accepted the money on the first bill; and joined issue on the plea as to the second.

On the trial before Lord Denman C. J., at the *London* sittings after last term, the defendant produced witnesses who deposed that they were acquainted with his handwriting, and believed that the acceptance was not his. The plaintiff's counsel then proposed to lay a paper, purporting to be signed by the defendant, before each of the defendant's witnesses in cross-examination, and to ask them in turn whether they believed the signature to be that of defendant, for the purpose of testing their knowledge of his handwriting by the

Per Lord Denman C. J. The objection would not have been removed by independent proof that the paper proposed to be laid before the witnesses was in fact written by defendant.

agreement

agreement or disagreement of their testimony on this point. The defendant's counsel objected to this course: and the Lord Chief Justice ruled that the paper could not be shewn to the witnesses, unless it was aliunde made relevant and evidence in the cause, or unless it was proved by independent evidence to have been written by the defendant. Verdict for the defendant.

1840.

GRIFFITHS
against
EVERY.

Jervis now moved for a new trial. This course of cross-examination has commonly been allowed; and it evidently affords a very good test of the knowledge of the witnesses. That the contents of the paper were irrelevant to the issue before the jury is no objection to the evidence: if it were, the objection would not be cured by shewing that it was written by the defendant; in which case, however, the Lord Chief Justice would have admitted it. The question therefore is, not as to the relevancy, but as to the fairness of the test. [Lord *Denman* C. J. I afterwards expressed a doubt whether I was justified in adding to the rule which I laid down the qualification from which you are now arguing.] It was unnecessary, for the application of the test, that the jury should see the paper at all: therefore the irrelevancy is unimportant. Suppose the issue had been on an intermediate indorsement, and the alleged indorser had been called to disprove such indorsement; the plaintiff might, if he pleased, have desired the witness to write his name; and the jury might have compared the two. Then might not witnesses have been called to shew that the two were similar? The former cases which may be cited for the defendant are no authority on this point. In *Griffith*
VOL. XI. Z v. *Williams*

1840.

GRIFFITHS
against
EVERY.

v. *Williams* (a) the jury were allowed to compare admitted signatures with the disputed one. In *Doe dem. Perry v. Newton* (b) this Court explained the last mentioned decision; and limited the admissibility to cases where the paper, to be used for the purpose of comparison, was in evidence for other purposes: in such a case, it seems, the paper, being necessarily let in, may be looked at for all purposes (c). And the question in *Doe dem. Mudd v. Suckermore* (d) related to the means which a witness had had of forming his belief from an inspection of writing previously produced in the cause (though not relevant), and admitted to be written by the party whose handwriting was in dispute. Here, the only use proposed to be made of the writing is to enable the jury to see how the same paper is judged of by different witnesses. It is useless to inquire as to the formation of particular letters; the test is, what impression does the general character of the writing make upon the witnesses' minds? And how can the competency of the witnesses to form an opinion upon the document in dispute be better tested than by shewing that they cannot agree whether another document is or is not the handwriting of the defendant. For this purpose it is immaterial whether such document be genuine or not. The jury need not look at the paper; for, if it lie on the table open before them, so that another document cannot be substituted for it, they have the means of testing the witnesses' knowledge of the defendant's writing by observing that, upon the same

(a) 1 Cr. & J. 47.

(b) 5 A. & E. 514.

(c) For another application of the same principle, see the judgment of Coleridge J. in *Wright v. Doe dem. Tatham*, 4 New. Ca. 489. 500.

(d) 5 A. & E. 703.

paper,

paper, they cannot agree. The ground upon which the admissibility of the evidence here rests is free from the objections urged in previous cases. The proposed course does not multiply the questions to be submitted to the jury; nor can it prejudice the opposite party by surprise; nor is it open to the risk of a paper being written in a manner assumed for the occasion. If such evidence were offered for a defendant on an indictment for forgery it could not be excluded: but the principle is the same here.

1840.

 GRIFFITHS
 against
 IVARY.

LITLEDALE J. I think there should be no rule in this case. The second document was allowed not to be evidence in the cause. Mr. *Jervis* says that the practice has been to permit the course of examination which he attempted; but I never knew it done when I was at the bar: the practice must have been adopted only recently. It would be going much further than we have hitherto gone: and I am not disposed to advance one iota beyond that which has been expressly decided on this point.

COLERIDGE J. I am altogether of the same opinion. The case comes within the rule laid down in *Doe dem. Perry v. Newton (a)*. We must not allow papers which are not evidence in the cause to be let in for any purpose whatever. It is said that this was offered merely for the purpose of trying the knowledge of the witnesses: but the inquiry would not stop there. It would be impossible to keep from the jury questions, whether this or that paper was or was not in fact written by the party.

(a) 5 A. & E. 514.

1840.

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GRIFFITHS
against
IVERY.

Lord DENMAN C. J. (a). I admit that the doctrine for which Mr. *Jervis* contends would fairly follow from the qualification with which I accompanied my ruling. But, in adding that qualification, I was clearly wrong. It would be ludicrous to suppose that a paper may be used for the purpose suggested, and that a jury must then be told that they cannot look at it to see how far its appearance supports the evidence of the witnesses. But, if they did look at it, all the unlimited multiplicity of questions would come before them, which we meant to shut out by our ruling in *Doe dem. Perry v. Newton* (b).

Rule refused.

(a) *Williams J.* was absent: see p. 322.

(b) 5 A. & E. 514.

Tuesday,
January 14th.

LYONS *against* DE PASS and Another.

A sale within the city of *London*, in an open shop, of goods usually dealt in there, is a sale in market overt, though the premises are described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within.

TROVER for 1000 pairs of slippers. Pleas. 1. Not Guilty. 2. That plaintiff was not possessed &c. Issues thereon.

On the trial before Lord *Denman* C. J., at the sittings in *London* after last *Michaelmas* term, the following facts appeared. The plaintiff dealt in slippers. One *Fuller*, who likewise dealt in them, came to him and asked for fifteen dozen of slippers, saying he had an order for them. Plaintiff refused to trust him with the goods, but went with him to the place of sale, which was the warehouse of the defendants, wholesale shoe manufacturers, in *Cateaton Street*, in the city of *London*. On arriving there, *Fuller* said to the plaintiff, "You must not go in, or you will spoil my custom." Plaintiff remained

mained on the outside a quarter of an hour, when *Fuller* came out (having sold and delivered the slippers to defendants in the warehouse), and, being asked by plaintiff for the money, made an excuse, and soon afterwards ran away. Plaintiff indicted *Fuller* for stealing the slippers; and he was convicted and sentenced. The defendants refusing, on demand, to restore the goods (which were not produced in Court), this action was brought. It was urged, on behalf of the defendants, that the goods had been bought by them in market overt, and, therefore, even if they were stolen, the property passed. The place of sale was mentioned, by a witness at nisi prius, as an "open shop." On cross-examination, he described it as an "open warehouse," with slippers in the window. The Lord Chief Justice stated to the jury that a shop in the city of *London* was market overt for things sold in the way of the trade there carried on, and left it to them to determine whether, under the circumstances proved, there had been such a sale to the defendants as came within the description of a sale in market overt. The jury found a verdict for the defendants; but leave was given to move to enter a verdict for the plaintiff, if the Court should hold that the warehouse could not, in point of law, have been a market overt.

1840.

LYONS
against
DE PASS.

Payne now moved accordingly. A warehouse is not a shop within the custom of *London*, as recognised in *The Case of Market-Overt* (a). [Lord Denman C. J. This was described as a public shop, where shoes appeared in the window.] The custom applies only to an open shop, into which persons may see. "A sale in a covert place within a fair, or market, does not change

(a) 5 Rep. 83 b. S. C., rather more at length, as *L'Evesque de Worcester's Case*, Moore, 569. S. C. Poph. 84.

1840. the property: as, in a back-room or warehouse." "Or, behind a hanging or cupboard, where a man passing before the shop cannot see." "Or, when the windows of the shop are shut." *Com. Dig. Market* (E.). The foundation of the custom relied upon was the openness of the shop. Where the premises no longer have that character, the custom fails. It is plain from the evidence in this case that the shop was not open so that a person without could see into it. [*Coleridge J.* The circumstance of being open to view was not peculiar to *London* shops. Lord *Denman* C. J. I left the matter to the jury; and they thought that this was an open shop.] Another objection to the sale in this case is, that neither party was a freeman. In *Taylor v. Chambers* (a) the defendant alleged that he bought the goods in his shop, being a freeman; and the Court evidently considered this material to the validity of the sale.

LYONS
against
DE PASS.

LORD DENMAN C. J. No question was raised here on that point; the right to keep the shop was assumed. According to *The Case of Market-Overt* (b), if the sale is in an open shop in the city of *London*, where goods of the same kind are usually sold, that is a sale in market-overt. There was no ground here for imputing to the defendant that he had bought secretly. Therefore it appears to me that there is no doubt upon this point.

LITLEDALE J. In *The Case of Market-Overt* (b) the sale which was held not to pass property was a sale of plate in a scrivener's shop, which is not a market for goods of that kind. But, if no such objection arises, it

(a) *Ord. Jac.* 63.

(b) 5 *Rep.* 83 b.

cannot be made a difficulty that there is now glass in the windows of shops, whereas in former times they were entirely open. Many shops now are more open in their construction than others; but no difference can be made on that account.

1840.

LYONS
against
DE PASS.

COLERIDGE J. (a). The custom is that every shop in London is a market-overt, for such things only as by the trade of the owner are put there to sell. If arguments were admitted on the shop being more or less open, the custom would, in effect, be destroyed.

Rule refused.

(a) *Williams J. was absent: see p. 322.*

DUBOIS *against* KEATS (a).

Wednesday,
January 15th.

CASE. The declaration stated that, whereas the plaintiff was a good, true, honest, &c., and had not ever been, or suspected to be, guilty of felony, &c., and whereas also heretofore, to wit 13th May 1839, a general session of the delivery of the gaol of *Newgate*, holden in and for the jurisdiction of the Central Criminal Court on that day, before &c., was held for the delivery of the gaol aforesaid, yet defendant, contriving &c., then, to wit on &c., at the general session aforesaid, falsely, and maliciously, and without any reasonable or probable cause

To a declaration for maliciously, and without probable cause, procuring plaintiff to be indicted at the Central Criminal Court for felony, it is no answer that the defendant was bound over by recognizance to prosecute, if the jury believe that the defendant

caused himself to be bound by making the charge maliciously, and without probable cause, before the magistrate who took the recognizance.

It is not incumbent on the judge in such a case to call the attention of the jury specifically to the circumstance that the injury alleged in the declaration is the preferring at the sessions of the Court a charge which is *then* maliciously made.

(a) For a point of practice made in this case, see *Dubois v. Keats*, 8 A. & E. 945, note (a).

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whatsoever,

1840.

 DUBOIS
 against
 KEATE.

whatsoever, indicted, and caused and procured to be indicted, the said plaintiff, for that he, on &c. (setting out a charge of larceny); that defendant afterwards, towit on &c., falsely and maliciously, and without any reasonable or probable cause, prosecuted, and caused to be prosecuted, the said indictment against the plaintiff, before the said justices; and such proceedings were thereupon then had in the said Court, &c. (stating acquittal by the petit jury, and plaintiff's discharge): by means of which said premises the plaintiff hath been and is greatly injured, &c.

Plea, Not Guilty.

On the trial before *Coleridge J.*, at the *London* sittings after last term, it appeared that the defendant had charged the plaintiff with the felony before a magistrate, who had held the plaintiff to bail to appear at the session of the Central Court, and had bound over the defendant to prosecute; and that the defendant had accordingly appeared as prosecutor at the session of the Central Court, when the plaintiff was acquitted. Evidence was given to shew that the charge from the first was malicious and without probable cause. The counsel for the defendant contended that he was entitled to a verdict, inasmuch as the declaration charged him in respect only of the prosecution at the session of the Central Court, which prosecution the defendant was compelled by the recognizance to carry on. The learned Judge told the jury that, if they believed the recognizance to have been the result of a charge made before the magistrate maliciously, and without probable cause, the recognizance was no defence, and the plaintiff was entitled to a verdict. Verdict for the plaintiff.

Kelly

Kelly now moved for a new trial on the ground of misdirection (a). The declaration is not supported by the evidence. It charges that the prosecution before the grand jury was malicious and without probable cause. But, as to that prosecution, the defendant was not a free agent: he was bound by recognizance to prefer the indictment. It was his duty to obey the direction of the magistrate; and, by not doing so, he would have been subject to forfeiture. [Lord Denman C. J. Can a man excuse the preferring a charge against a fellow subject which he knew to be false, merely because he would otherwise have suffered pecuniary loss by forfeiting his recognizance? *Littledale J.* If a defendant were bound over against his will, as, for instance, if a third party informed the magistrate that the plaintiff had been seen to pick the defendant's pocket, and the magistrate sent for the defendant and bound him over to prosecute, the defendant would not be liable to an action.] By following out that principle, it will be found that the defendant is not liable here. [Coleridge J. A fresh motive is introduced in the case before the Court, in addition to that in the supposed case.] The only question on this record is, whether the charge before the grand jury was preferred maliciously and without probable cause? It could not be so, if the defendant was compelled by recognizance to prefer it. If the recognizance itself was obtained maliciously and without probable cause, there would be good ground for an action upon the case for that proceeding; but it would not shew the malice charged in this declaration. The defendant might have changed his purpose between the two

1840.

 DUBOIS
 against
 KEATS.

(a) The motion was made also on the alleged ground that the damages were excessive.

proceedings.

1840.

 DUBON
 against
 KEATE.

proceedings. And, further, the learned Judge omitted to draw the attention of the jury to the circumstance that the question was as to the malice and want of probable cause at the time of the charge before the grand jury: by which means the evidence given of the willingness or unwillingness of the defendant, and his course of proceeding at that time, lost its weight. (He then went into the evidence on this point.)

Lord DENMAN C. J. I do not entertain the smallest doubt on the first point. It is supposed that a charge cannot be preferred before a grand jury maliciously, if the party be bound to prefer it, though the recognizance be obtained in consequence of his malicious proceeding. I have not the smallest doubt that a recognizance so obtained does not justify the party, or prevent his subsequent conduct from being malicious. Then it is said that the learned Judge did not, with sufficient precision, put it to the jury whether the charge before the grand jury proceeded from malice, or from the necessity under which the defendant was placed by the recognizance. I do not know that the Judge was bound to put the question so pointedly. If the jury thought that the charge originated in malice, of which there was evidence, then, according to the view which I have taken of the first point, the plaintiff was entitled to recover.

LITLEDALE J. As to the first point, many cases may be put in which it is a sufficient answer to a complaint like this, that the party was bound by recognizance to prosecute; for instance, if an unwilling party were bound over. But the recognizance would then furnish

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an answer for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by a malicious motive in making his charge before the magistrate. All the circumstances must be taken together, and submitted to the jury, so that, upon the whole, they may judge whether the motive be malicious. As to the other point, I do not think that the Judge was bound to draw the attention of the jury specifically to every part of the case, as it is suggested he should have done.

1840.

DUBOIS
against
KEATS.

COLERIDGE J. concurred (a).

Rule refused.

(a) *Williams J. was absent: see p. 322.*

DOE on the several demises of MULLARKY and
Others against ROE.

Tuesday,
January 15th.

IN this case judgment was signed against the casual ejector on 2d *December* 1839, the time for appearance having expired on 29th *November* 1839. On 9th *January* 1840, *Patteson J.*, at chambers, ordered that, on payment of costs, the judgment and subsequent proceedings should be set aside, and that *James Buckland* and *James Buckland* the younger should be at liberty to appear and plead as tenants. The affidavit used on the summons alleged that, in *October* 1839, the two *Bucklands* instructed their attorney to appear and defend

After judgment signed against the casual ejector, and writ of possession executed, a judge at chambers may, if satisfied as to facts, direct the judgment and subsequent proceedings to be set aside on payment of costs, and a party let in to defend as

tenant. As where the attorney for such party was duly instructed to appear, but, through inadvertence, suffered the time to expire without appearing.

Although the case set up by such party is that he has been in possession throughout,

on

1840.

—
Doe dem.
MULLARKY
against
ROE.

on their behalf as tenants and landlords, and that he, entirely through inadvertence, did not instruct his agents to appear in time. The affidavit also stated that the writ of possession was not yet fully executed; that the *Bucklands* remained in possession, and that they had a good defence on the merits; but all these allegations were contradicted by the affidavits in answer.

Wordsworth now moved that the order might be rescinded. No authority can be found justifying this order. There have been a regular judgment and execution; the application does not resemble one made by a third party seeking to come in and defend, and thereby become a party to the suit, in the course of the proceedings; here one who has been in the position of defendant from the first seeks to set aside proceedings which are already complete. There is no pretence that any irregularity has taken place. [*Coleridge J.* Surely it is not an uncommon order; ever since I have been in the profession I have understood that such a power is always exercised, though it is not known how it was acquired. I have done it again and again. *Littledale J.* I should have no scruple in making such an order at chambers, upon a proper case.] The ordinary case is where third parties apply, as where a devisee is let in to defend, after service of the declaration upon tenants. [Lord *Denman C. J.* There would be nothing in such a particular state of things to confer jurisdiction, if it did not exist generally. *Littledale J.* The constancy of the practice will account for there being nothing on the point in the reports.] If an action were brought to recover a chattel, and judgment were recovered and execution issued, a judge could not order

order the chattel to be given back. Yet there the execution is final, whereas here only possession is given. [Coleridge J. The order here does not restore possession.] That is another objection to the order. [Coleridge J. It is not an objection which you can take.] Even on the application of a landlord, the Court has sometimes refused to admit the landlord to defend after execution has issued. Stat. 11 G. 2. c. 19. s. 13. enables the Court, on the application of landlords, to stay execution, but not to set it aside. [Coleridge J. That is altogether a distinct question.] The merits also, on the affidavits, are with the lessor of the plaintiff.

1840.

Doe dem.
MULLARKY
against
ROE.

LORD DENMAN C. J. The merits were for the consideration of the Judge, provided he had the jurisdiction, which he undoubtedly had.

LITLEDALE J. There is not the slightest difficulty on the point of jurisdiction.

COLERIDGE J. (a) concurred.

Rule refused (b).

(a) Williams J. was absent. See p. 322.

(b) See *Doe Dem. Shaw v. Roe*, 13 Price, 260.

JANE DOLBY and LOUISA DOLBY *against* ILES.

Wednesday,
January 15th.

ASSUMPSIT for the use and occupation of premises had, held, &c., by the sufferance and permission of the plaintiffs &c. Pleas. 1. Except as to 14l. 2s.,

A person who has occupied premises, and paid rent to the apparent proprietor as his

landlord, cannot, when sued by him for the use and occupation, allege that he has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action.

Although the plaintiff, at the trial, discloses that fact in proving his own case.

parcel

1840.

DOLBY
against
LEE.

parcel &c., non assumpsit. Issue thereon. 2. Except as to the 14*l.* 2*s.*, payment, and acceptance in satisfaction: verification. 3. As to the 14*l.* 2*s.*, payment into Court. Replication to the second plea, traversing the payment and acceptance: issue thereon. To the third plea, acceptance of 14*l.* 2*s.* in satisfaction as to that sum. On the trial before Lord *Denman* C. J., at the sittings in *London* after last *Michaelmas* term, it appeared that the premises were demised to one *Garratt* for a term; he died; and the defendant married the widow and occupied the premises till the term expired, a period of about three years. The lessor, *Charles Dolby*, the father of the plaintiffs, died before the time when the present causes of action were supposed to have accrued, and, by his will, devised his real property to *Edward Williams* and two others in trust for the plaintiffs, with power to sell, and appointed the three trustees and the two plaintiffs his executors. The plaintiffs were to receive the rents, and give receipts, during their lives. The evidence did not distinctly shew whether *Charles Dolby's* estate in the premises had been leasehold or freehold. After his death, and after the expiration of the above-mentioned term, the defendant continued to hold the premises, and paid rent, receipts for which appeared to have been given him in one instance by *Edward Williams*, signing as executor, and in others by the plaintiff, *Jane Dolby*, signing as executrix. In making one of the payments to *Jane Dolby* he had obtained a reduction on account of repairs. Evidence was given of a conversation, in which the defendant had endeavoured to obtain a new lease, and admitted to the plaintiffs' solicitor that he held under them. *Charles Dolby's* will was put in as part of the
case

case for the plaintiffs. *Williams*, the trustee, was living when the action was brought. On the defendant's part it was objected that, even assuming him to have recognised the plaintiffs as his landladies, they could not recover, because their own case shewed that the legal title was not in them. The Lord Chief Justice thought otherwise, but gave leave to move to enter a nonsuit if the Court should agree in the objection. He left it to the jury to say whether the recognition was proved, and whether (upon facts not material here, as to repairs for which the defendant claimed a deduction) the plaintiffs were entitled to recover more than the 14*l.* 2*s.* Being requested by the defendant's counsel to put it to the jury to say (if they found a recognition) whether the defendant had recognised the plaintiffs as landladies in their own right, or as executors only, he declined doing so. The plaintiffs had a verdict for 85*l.*

1840.

 DOWRY
against
ILES.

G. T. White now moved for a rule to shew cause why a nonsuit should not be entered. The payment into Court does not preclude the defendant from contesting the plaintiffs' right to recover more than the sum paid in: *Reid v. Dickons* (a). In cases where the title is merely doubtful, a recognition by the party charged as tenant may remove all difficulty; but here the plaintiffs shewed by their own evidence that they had no title on which the action could be supported. If they relied upon a chattel interest vested in themselves as executors, there were other executors jointly interested with them; and the recognition of one was a recognition of all. If they claimed in respect of title to the real estate, that, as the will shewed, was in the trustees. The recognition

(a) 5 B. & Ad. 499.

1840.

DOLBY
against
LES.

must be construed according to the legal right. [*Coleridge* J. You have made a payment of rent in fact to them. Can you, then, because they shew that they have not the legal estate, allege that rent is not due to them? There has been an occupation by the sufferance and permission of the equitable tenant for life. *Little-dale* J. You cannot say that the cestuique trust has no right to sue.] If he himself shews that he has not the legal estate, the tenant may avail himself of the fact. [Lord *Denman* C. J. Stat. 11 G. 2. c. 19. s. 14. empowers "the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant" in an action for use and occupation. I should think the term "landlord," there, meant the person whom the defendant has treated as the landlord. *Coleridge* J. Suppose they are merely in possession, and suffer you to come in, and you accept possession under them: if they afterwards admit that they have no title, can you take advantage of that?] There was no evidence of the defendant's coming in under the *Dolbys* except his recognition. The extent of that recognition ought to have been decided upon by the jury. (He was then proceeding to argue upon the effect of the devise.) [Lord *Denman* C. J. We wish to hear all you have to say as to setting up want of title against the proof of occupation and payment of rent. Here the defendant had paid every thing up to the end of the period of occupation, except that he had not done certain repairs, for which he claimed credit. Then, having paid so much on account as between landlord and tenant, he says, I can shew by *Charles Dolby's* will that you are only equitable tenant for life.] The words

words "landlord or landlords" in stat. 11 G. 2. c. 19. s. 14., must mean the person having the legal estate. [*Coleridge J.* That cannot be the only meaning; otherwise no one who had not the legal estate could bring an action for use and occupation.] The facts here are not answerable to the words of the declaration, "premises" "by the sufferance and permission of the said plaintiffs" "had, held" &c.

1840.

DOLBY
against
LES.

Lord DENMAN C.J. I think the Court is satisfied that this defence is not open to you.

LITLEDAL and COLERIDGE Js. (a) concurred.

Rule refused.

(a) *Williams J.* was absent: see p. 322.

FAITH against RICHMOND, BARBOUR, and
HANNAY.

Wednesday,
January 15th.

ASSUMPSIT. The declaration stated that defendants, on &c., made their promissory note in writing, and delivered the same to *John Botcherby*, and thereby promised &c. (count, in the usual form, by *J. B.*'s indorsee on a note for 350*l.* payable at six months). *Barbour* and *Hannay* pleaded that they did not make the note as in the declaration alleged; and on this plea issue was joined (a). *Richmond* suffered judgment by default.

Where a partner accustomed to issue notes on behalf of the firm indorses a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account in

an action brought upon it by the indorsee, the proper question for the jury is, whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner.

So held where a partner in "*The Newcastle and Sunderland Wall's End Coal Company*" drew a note in the name of "*The Newcastle Coal Company*," and made it payable at a bank where the first-mentioned company had no account.

(a) There were other issues, which it is not material to state.

VOL. XI.

A a

On

1840.

DUBOIS
against
KEATS.

whatsoever, indicted, and caused and procured to be indicted, the said plaintiff, for that he, on &c. (setting out a charge of larceny); that defendant afterwards, towit on &c., falsely and maliciously, and without any reasonable or probable cause, prosecuted, and caused to be prosecuted, the said indictment against the plaintiff, before the said justices; and such proceedings were thereupon then had in the said Court, &c. (stating acquittal by the petit jury, and plaintiff's discharge): by means of which said premises the plaintiff hath been and is greatly injured, &c.

Plea, Not Guilty.

On the trial before *Coleridge J.*, at the *London* sittings after last term, it appeared that the defendant had charged the plaintiff with the felony before a magistrate, who had held the plaintiff to bail to appear at the session of the Central Court, and had bound over the defendant to prosecute; and that the defendant had accordingly appeared as prosecutor at the session of the Central Court, when the plaintiff was acquitted. Evidence was given to shew that the charge from the first was malicious and without probable cause. The counsel for the defendant contended that he was entitled to a verdict, inasmuch, as the declaration charged him in respect only of the prosecution at the session of the Central Court, which prosecution the defendant was compelled by the recognizance to carry on. The learned Judge told the jury that, if they believed the recognizance to have been the result of a charge made before the magistrate maliciously, and without probable cause, the recognizance was no defence, and the plaintiff was entitled to a verdict. Verdict for the plaintiff.

Kelly

ner in the first-mentioned firm, had authority to draw.
Verdict for the defendants *Barbour* and *Hannay*.

1840.

FAITH
against
RICHMOND.

M. Smith now moved for a new trial on the ground of misdirection. The Lord Chief Justice ought not to have left it to the jury to say whether *Richmond* was authorized to make the note; because, if it was a partnership note, authority was to be inferred from his being a partner. The real question was, whether the firm was known by the name used on this note; not, as the jury were led to suppose, whether *Richmond* had authority given him to draw this particular instrument. [Lord *Denman* C. J. I do not think the case was put so.] If there was sufficient evidence that the name here used did in fact designate the partnership, a slight irregularity in the description could not invalidate *Richmond's* act. In *Williamson v. Johnson* (a) the managing partner had been used occasionally to indorse bills in names which did not accurately describe the existing firm. *Abbott* C. J. held that, as the partner had been in the habit of issuing bills so indorsed, there was sufficient evidence of an indorsement by the then firm, in an action by the indorsee against the acceptor: and the Court also was of that opinion, *Holroyd* J. observing that evidence of the partner's hand-writing would, as between third persons, have been sufficient, without proof of any usage on his part to indorse in this manner. In the present case it did appear from the evidence that the company had no very fixed name or style. [Lord *Denman* C. J. The question I put, though I may not have explained myself sufficiently, was, whether the deviation from the real partnership name

(a) 1 B. & C. 146.

1840.

DUNN
against
KEATE.

proceedings. And, further, the learned Judge omitted to draw the attention of the jury to the circumstance that the question was as to the malice and want of probable cause at the time of the charge before the grand jury: by which means the evidence given of the willingness or unwillingness of the defendant, and his course of proceeding at that time, lost its weight. (He then went into the evidence on this point.)

Lord DENMAN C. J. I do not entertain the smallest doubt on the first point. It is supposed that a charge cannot be preferred before a grand jury maliciously, if the party be bound to prefer it, though the recognizance be obtained in consequence of his malicious proceeding. I have not the smallest doubt that a recognizance so obtained does not justify the party, or prevent his subsequent conduct from being malicious. Then it is said that the learned Judge did not, with sufficient precision, put it to the jury whether the charge before the grand jury proceeded from malice, or from the necessity under which the defendant was placed by the recognizance. I do not know that the Judge was bound to put the question so pointedly. If the jury thought that the charge originated in malice, of which there was evidence, then, according to the view which I have taken of the first point, the plaintiff was entitled to recover.

LITLEDALE J. As to the first point, many cases may be put in which it is a sufficient answer to a complaint like this, that the party was bound by recognizance to prosecute; for instance, if an unwilling party were bound over. But the recognizance would then furnish

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the firm. But the name was different; and the note was made payable at a place where they never kept money.

1840.

FAITH
against
RICHMOND.

Rule refused.

The QUEEN *against* The Justices for the Eastern Division of SUSSEX. *Thursday, January 16th.*

This case is reported, 10 *A. & E.* 682.

The QUEEN *against* The Inhabitants of BARTON. *Friday, January 17th.*

INDICTMENT for non-repair of a road. The first count stated that, from time whereof &c., there was a certain common and ancient highway, leading from *Luton* in *Bedfordshire*, through and over certain parts of the parishes of *Barton* and *Streatley*, respectively, in the said county and in a certain district, towit *The Luton District*, specified in an act after mentioned, and to *Bedford* in the said county; a large portion of such highway being situate in the parish of *Barton*, and a certain other large portion in the parish of *Streatley*, used by all the liege &c.; and that the inhabitants of *Barton*, from time whereof &c., had repaired and amended, and had been used and accustomed to repair and amend, and of right ought &c., and, at the time of the alteration and diversion thereafter mentioned of the aforesaid highway, were bound and ought of right to have repaired and amended, such part of the said common highway as was situate in the parish of *Barton*, being and containing in length &c. (setting it out): and that, before the day of taking that inquisition, and after

Stat. 4 G. 4.
c. 95. s. 68.,
which provides
for apportion-
ing the liability
to repair turn-
pike roads
that have been
diverted, is not
confined to
bodies politic
or corporate
and individuals,
but applies also
to parishes.

1840.

DOZ dem.
MULLARKY
against
ROE.

on their behalf as tenants and landlords, and that he, entirely through inadvertence, did not instruct his agents to appear in time. The affidavit also stated that the writ of possession was not yet fully executed; that the *Bucklands* remained in possession, and that they had a good defence on the merits; but all these allegations were contradicted by the affidavits in answer.

Wordsworth now moved that the order might be rescinded. No authority can be found justifying this order. There have been a regular judgment and execution; the application does not resemble one made by a third party seeking to come in and defend, and thereby become a party to the suit, in the course of the proceedings; here one who has been in the position of defendant from the first seeks to set aside proceedings which are already complete. There is no pretence that any irregularity has taken place. [*Coleridge J.* Surely it is not an uncommon order; ever since I have been in the profession I have understood that such a power is always exercised, though it is not known how it was acquired. I have done it again and again. *Littledale J.* I should have no scruple in making such an order at chambers, upon a proper case.] The ordinary case is where third parties apply, as where a devisee is let in to defend, after service of the declaration upon tenants. [Lord *Denman C. J.* There would be nothing in such a particular state of things to confer jurisdiction, if it did not exist generally. *Littledale J.* The constancy of the practice will account for there being nothing on the point in the reports.] If an action were brought to recover a chattel, and judgment were recovered and execution issued, a judge could not order

order the chattel to be given back. Yet there the execution is final, whereas here only possession is given. [Coleridge J. The order here does not restore possession.] That is another objection to the order. [Coleridge J. It is not an objection which you can take.] Even on the application of a landlord, the Court has sometimes refused to admit the landlord to defend after execution has issued. Stat. 11 G. 2. c. 19. s. 13. enables the Court, on the application of landlords, to stay execution, but not to set it aside. [Coleridge J. That is altogether a distinct question.] The merits also, on the affidavits, are with the lessor of the plaintiff.

1840.

DOE dem.
MULLARKY
against
ROE.

LORD DENMAN C. J. The merits were for the consideration of the Judge, provided he had the jurisdiction, which he undoubtedly had.

LITLEDALE J. There is not the slightest difficulty on the point of jurisdiction.

COLERIDGE J. (a) concurred.

Rule refused (b).

(a) Williams J. was absent. See p. 322.

(b) See *Doe Dem. Shaw v. Roe*, 13 Price, 260.

JANE DOLBY and LOUISA DOLBY *against* ILES. *Wednesday, January 15th.*

ASSUMPSIT for the use and occupation of premises had, held, &c., by the sufferance and permission of the plaintiffs &c. Pleas. 1. Except as to 14l. 2s., landlord, cannot, when sued by him for the use and occupation, allege that he has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action.

Although the plaintiff, at the trial, discloses that fact in proving his own case.

parcel

1840.

DOLBY
against
ILES.

parcel &c., non assumpsit. Issue thereon. 2. Except as to the 14*l.* 2*s.*, payment, and acceptance in satisfaction: verification. 3. As to the 14*l.* 2*s.*, payment into Court. Replication to the second plea, traversing the payment and acceptance: issue thereon. To the third plea, acceptance of 14*l.* 2*s.* in satisfaction as to that sum. On the trial before Lord *Denman* C. J., at the sittings in *London* after last *Michaelmas* term, it appeared that the premises were demised to one *Garratt* for a term; he died; and the defendant married the widow and occupied the premises till the term expired, a period of about three years. The lessor, *Charles Dolby*, the father of the plaintiffs, died before the time when the present causes of action were supposed to have accrued, and, by his will, devised his real property to *Edward Williams* and two others in trust for the plaintiffs, with power to sell, and appointed the three trustees and the two plaintiffs his executors. The plaintiffs were to receive the rents, and give receipts, during their lives. The evidence did not distinctly shew whether *Charles Dolby's* estate in the premises had been leasehold or freehold. After his death, and after the expiration of the above-mentioned term, the defendant continued to hold the premises, and paid rent, receipts for which appeared to have been given him in one instance by *Edward Williams*, signing as executor, and in others by the plaintiff, *Jane Dolby*, signing as executrix. In making one of the payments to *Jane Dolby* he had obtained a reduction on account of repairs. Evidence was given of a conversation, in which the defendant had endeavoured to obtain a new lease, and admitted to the plaintiffs' solicitor that he held under them. *Charles Dolby's* will was put in as part of the
case

case for the plaintiffs. *Williams*, the trustee, was living when the action was brought. On the defendant's part it was objected that, even assuming him to have recognised the plaintiffs as his landladies, they could not recover, because their own case shewed that the legal title was not in them. The Lord Chief Justice thought otherwise, but gave leave to move to enter a nonsuit if the Court should agree in the objection. He left it to the jury to say whether the recognition was proved, and whether (upon facts not material here, as to repairs for which the defendant claimed a deduction) the plaintiffs were entitled to recover more than the 14*l.* 2*s.* Being requested by the defendant's counsel to put it to the jury to say (if they found a recognition) whether the defendant had recognised the plaintiffs as landladies in their own right, or as executors only, he declined doing so. The plaintiffs had a verdict for 85*l.*

1840.

*Dowry
against
Iles.*

G. T. White now moved for a rule to shew cause why a nonsuit should not be entered. The payment into Court does not preclude the defendant from contesting the plaintiffs' right to recover more than the sum paid in: *Reid v. Dickons* (a). In cases where the title is merely doubtful, a recognition by the party charged as tenant may remove all difficulty; but here the plaintiffs shewed by their own evidence that they had no title on which the action could be supported. If they relied upon a chattel interest vested in themselves as executors, there were other executors jointly interested with them; and the recognition of one was a recognition of all. If they claimed in respect of title to the real estate, that, as the will shewed, was in the trustees. The recognition

(a) 5 B. & Ad. 499.

1840.

DOLBY
against
LRS.

must be construed according to the legal right. [*Coleridge* J. You have made a payment of rent in fact to them. Can you, then, because they shew that they have not the legal estate, allege that rent is not due to them? There has been an occupation by the sufferance and permission of the equitable tenant for life. *Little-dale* J. You cannot say that the cestuique trust has no right to sue.] If he himself shews that he has not the legal estate, the tenant may avail himself of the fact. [Lord *Denman* C. J. Stat. 11 G. 2. c. 19. s. 14. empowers "the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant" in an action for use and occupation. I should think the term "landlord," there, meant the person whom the defendant has treated as the landlord. *Coleridge* J. Suppose they are merely in possession, and suffer you to come in, and you accept possession under them: if they afterwards admit that they have no title, can you take advantage of that?] There was no evidence of the defendant's coming in under the *Dolbys* except his recognition. The extent of that recognition ought to have been decided upon by the jury. (He was then proceeding to argue upon the effect of the devise.) [Lord *Denman* C. J. We wish to hear all you have to say as to setting up want of title against the proof of occupation and payment of rent. Here the defendant had paid every thing up to the end of the period of occupation, except that he had not done certain repairs, for which he claimed credit. Then, having paid so much on account as between landlord and tenant, he says, I can shew by *Charles Dolby's* will that you are only equitable tenant for life.] The words

words "landlord or landlords" in stat. 11 G. 2. c. 19. s. 14., must mean the person having the legal estate. [Coleridge J. That cannot be the only meaning; otherwise no one who had not the legal estate could bring an action for use and occupation.] The facts here are not answerable to the words of the declaration, "premises" "by the sufferance and permission of the said plaintiffs" "had, held" &c.

1840.

DOLBY
against
LES.

LORD DENMAN C. J. I think the Court is satisfied that this defence is not open to you.

LITLEDAL and COLERIDGE Js. (a) concurred.

Rule refused.

(a) *Williams J.* was absent: see p. 322.

FAITH *against* RICHMOND, BARBOUR, and
HANNAY.

Wednesday,
January 15th.

ASSUMPSIT. The declaration stated that defendants, on &c., made their promissory note in writing, and delivered the same to *John Botcherby*, and thereby promised &c. (count, in the usual form, by *J. B.*'s indorsee on a note for 350*l.* payable at six months). *Barbour* and *Hannay* pleaded that they did not make the note as in the declaration alleged; and on this plea issue was joined (a). *Richmond* suffered judgment by default.

Where a partner accustomed to issue notes on behalf of the firm indorses a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account in

an action brought upon it by the indorsee, the proper question for the jury is, whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner.

So held where a partner in "*The Newcastle and Sunderland Wall's End Coal Company*" drew a note in the name of "*The Newcastle Coal Company*," and made it payable at a bank where the first-mentioned company had no account.

(a) There were other issues, which it is not material to state.

VOL. XI.

A a

On

1840.

FAITH
against
RICHMOND.

On the trial before Lord *Denman* C. J., at the sittings in *London* after *Michaelmas* term 1839, it appeared that *Richmond*, *Barbour*, and *Hannay* carried on business in partnership under the name of "*The Newcastle and Sunderland Wall's End Coal Company*." The note declared upon was drawn by *Richmond*, and was as follows.

London, April 28th 1837.

Six months after date we promise to pay Mr. *John Botcherby* or order three hundred and fifty pounds for value received.

For *The Newcastle Coal Company*,

William Richmond, manager.

At the *London and Westminster Bank*,

9, *Waterloo Place*.

There was no proof of a specific authority to draw such a note. The defendants' firm had no account at the *London and Westminster Bank*. It was objected that, admitting *Richmond* to be entitled, as a partner, to make promissory notes on behalf of the *Newcastle and Sunderland Wall's End Coal Company*, yet this was not a note drawn on their behalf, and could not bind them, "*The Newcastle Coal Company*" not being their firm, nor the *London and Westminster Bank* one with which they dealt. The Lord Chief Justice, in summing up, observed that the three defendants were partners, and *Richmond* might draw bills or notes as their agent, and that, if he had done so in the name of *The Newcastle and Sunderland Wall's End Coal Company*, or if the plaintiff had been used to deal with them as *The Newcastle Coal Company*, the defendants would have been bound: but he left it to the jury to say, on the evidence, whether the note in question was one which *Richmond*, as a partner

mer in the first-mentioned firm, had authority to draw.
Verdict for the defendants *Barbour* and *Hannay*.

1840.

FAITH
against
RICHMOND.

M. Smith now moved for a new trial on the ground of misdirection. The Lord Chief Justice ought not to have left it to the jury to say whether *Richmond* was authorized to make the note; because, if it was a partnership note, authority was to be inferred from his being a partner. The real question was, whether the firm was known by the name used on this note; not, as the jury were led to suppose, whether *Richmond* had authority given him to draw this particular instrument. [Lord *Denman* C. J. I do not think the case was put so.] If there was sufficient evidence that the name here used did in fact designate the partnership, a slight irregularity in the description could not invalidate *Richmond's* act. In *Williamson v. Johnson* (a) the managing partner had been used occasionally to indorse bills in names which did not accurately describe the existing firm. *Abbott* C. J. held that, as the partner had been in the habit of issuing bills so indorsed, there was sufficient evidence of an indorsement by the then firm, in an action by the indorsee against the acceptor: and the Court also was of that opinion, *Holroyd* J. observing that evidence of the partner's hand-writing would, as between third persons, have been sufficient, without proof of any usage on his part to indorse in this manner. In the present case it did appear from the evidence that the company had no very fixed name or style. [Lord *Denman* C. J. The question I put, though I may not have explained myself sufficiently, was, whether the deviation from the real partnership name

(a) 1 B. & C. 146.

1840.

FAITH
against
RICHMOND.

was so great as to shew that *Richmond* must be considered as making the note on his own account, and not entitled to bind the firm by it; or whether the style used, though slightly varying from that of the firm, was essentially the same.]

LITLEDALE J. There is no ground for a rule. *Richmond* had authority, as a partner, to make notes in the name of the firm. It does not appear that they empowered him to use any name but that which the firm usually went by. In *Williamson v. Johnson* (a) there was evidence that the managing partner had on some former occasions indorsed bills in the name objected to. I do not understand that the Lord Chief Justice put it to the jury whether *Richmond* had authority to sign this particular note, but whether the general authority which he had enabled him to draw such a note.

COLERIDGE J. (b). In an ordinary case of this kind, the only question would be, whether the person making the note was a partner. But here a further question arises, whether, being a partner, he had authority to sign such a note; and it appears that he had not.

Lord DENMAN C. J. In this case, *Richmond* had authority to make notes as a partner in the company: but the note in question described a different firm; and the question was whether the evidence raised any exception to the general rule as to the exercise of a partner's authority. I asked the jury whether the designation used, though inaccurate, was substantially that of

(a) 1 B. & C. 146.

(b) *Williams J.* was absent: see p. 322.

the firm. But the name was different; and the note was made payable at a place where they never kept money.

1840.

FAITH
against
RICHMOND.

Rule refused.

The QUEEN *against* The Justices for the Eastern Division of SUSSEX. *Thursday, January 16th.*

This case is reported, 10 *A. & E.* 682.

The QUEEN *against* The Inhabitants of BARTON. *Friday, January 17th.*

INDICTMENT for non-repair of a road. The first count stated that, from time whereof &c., there was a certain common and ancient highway, leading from *Luton* in *Bedfordshire*, through and over certain parts of the parishes of *Barton* and *Streatley*, respectively, in the said county and in a certain district, towit *The Luton District*, specified in an act after mentioned, and to *Bedford* in the said county; a large portion of such highway being situate in the parish of *Barton*, and a certain other large portion in the parish of *Streatley*, used by all the liege &c.; and that the inhabitants of *Barton*, from time whereof &c., had repaired and amended, and had been used and accustomed to repair and amend, and of right ought &c., and, at the time of the alteration and diversion thereafter mentioned of the aforesaid highway, were bound and ought of right to have repaired and amended, such part of the said common highway as was situate in the parish of *Barton*, being and containing in length &c. (setting it out): and that, before the day of taking that inquisition, and after

Stat. 4 G. 4. c. 95. s. 68., which provides for apportioning the liability to repair turnpike roads that have been diverted, is not confined to bodies politic or corporate and individuals, but applies also to parishes.

1840.

The QUEEN
against
The Inhabit-
ants of
BARTON.

the passing and carrying into operation of three acts of parliament named (road acts, 15 G. 3. c. 72., 35 G. 3. c. 163., 56 G. 3. c. lxxii., local and personal, public), and after the passing of stat. 4 G. 4. c. 95. (a), towit on 13th May 1839, at the parishes of *Barton* and *Streatley*, viz. in &c., five persons named in the indictment, being five of the trustees for the time being of *The Laton District*, duly nominated, &c., for putting the said recited acts in execution, having taken upon themselves

(a) "An act to explain and amend an act" &c. (the general turnpike act, 3 G. 4. c. 126.).

Sect. 68. "And whereas doubts have arisen and may arise, whether any body politic or corporate, or any particular person or persons, liable to repair, by tenure or otherwise, any old turnpike road or part of such road widened, altered, diverted or turned, ought to repair or contribute to the repair of the whole or any part or proportion of the new road set out in lieu of the old turnpike road; for obviating such doubts, and preventing disputes about the same, be it further enacted, that all and every body politic or corporate, and person and persons, who was, were or shall be liable as aforesaid to the repair of any old turnpike road, which has been since the passing of the said recited act, or shall be widened, altered, diverted or turned, shall respectively be and continue in the same manner liable to the repair of such new road, set out in lieu of the old road, or so much thereof as shall be equal to the burthen and expence of repairing such old road, from which he, she or they shall be exonerated by the widening, altering, diverting or turning thereof; and if the several parties interested therein cannot agree, the same shall be viewed by two justices of the peace of the county where such road shall be, and shall be settled, adjusted and determined by them, in such manner as they shall think just and reasonable; and from and after such determination of the justices, the body politic or corporate, and person or persons liable to repair such new road as aforesaid, shall bear all charges of presentments, indictments and prosecutions for not repairing the same; and if it shall be found more convenient to fix a gross sum or an annual sum, to be paid by any such body politic or corporate, or person or persons, instead of fixing the part or proportion of such new road to be repaired by him, her or them, the said justices may, with the consent of such person or persons, and also of the trustees or commissioners of the road, obtained at a meeting of such trustees or commissioners, order and direct the same accordingly; and the order and direction of the said justices shall be final and conclusive, and shall continue binding on all bodies politic or corporate, and persons whomsoever."

the

the burthen of the execution of the same, under and by virtue and in pursuance of the said several acts, did then and there alter, divert, vary, and turn, a certain part of the said road, so leading from the town of *Luton* through the village of *Barton* to the town of *Bedford*, towit that part thereof situate and being within the respective parishes of *Barton* and *Streatley*, through certain other lands of the said parishes of *Barton* and *Streatley*, respectively, into and through certain other parts of the said parishes of *Barton* and *Streatley*, respectively: and thereupon afterwards, and after the said ancient highway had been so altered &c., and after the passing of stat. 4 G. 4. c. 95., towit on 11th September 1837, at &c., disputes arose between the respective parishes aforesaid, as to the proportion of the said new part of the said highway, so diverted as aforesaid, which each such parish ought to repair; and the several parishes aforesaid could not then and there agree in respect thereof; and the said new part of the said new highway was then and there, towit in the respective parishes of *Barton* and *Streatley*, (that is to say) in &c., viewed by *George Musgrave* and *Henry Musgrave Musgrave*, Esquires, then and there being two of her Majesty's justices of the peace acting in and for the said county of *Bedford*, in the manner directed by the last-mentioned act, and in pursuance of the powers and provisions therein contained; and the same was then and there by the said justices settled, adjusted, and determined, in manner following, that is to say by a certain order and direction in writing of them the said justices, under their respective hands and seals, by them then and there made, whereby &c. (The indictment then stated the effect of the order, which, after reciting the

1840.

The QUEEN
against
The Inhabit-
ants of
BARTON.

1840.

—
The QUEEN
against
The Inhabit-
ants of
BARTON.

diversion by the trustees, the disputes, and the enactment of stat. 4 G. 4. c. 95. s. 68., stated that the justices had viewed as well the old as the new road, and did settle, adjust, and determine that the inhabitants of the said parishes of *Barton* and *Streatley* should respectively be liable to the repair of such part and parts of the said new road as should be equal to the burthen and expense of repairing such old road, or as near thereto as could be set out: and they adjudged and determined such proportions to be as follows; that the inhabitants of the parish of *Barton* should repair the new road from &c. to &c. (setting out the parts): That the order was afterwards, to wit on 25th September 1837, at &c., duly signed and sealed, and afterwards filed at the general quarter sessions holden for *Bedfordshire* on 17th October 1837; of all which the defendants had due notice, and were required to repair the said part of the said new highway or road which they were by the said order directed &c. That a portion of the said part &c. (describing the portion), on &c., at the parish of *Streatley*, that is to say in &c., was and yet is very ruinous &c., against the peace &c.: and that the defendants, the said part of the said common highway, so as aforesaid being in decay, ought to repair and amend, when and so often as it should be necessary.

The second count stated that the highway ran and passed through, and was in, the parishes of *Barton* and *Streatley*; and that the justices made the order, of which the defendants had notice and by virtue thereof became liable to repair the portion mentioned in the order, and that a part of it was out of repair, &c.

The third count described the highway as being in the parish of *Barton*, leading from *Luton* to *Bedford*,
and

and charged that a part thereof, which was described, was ruinous &c., and that defendants of right ought to have repaired &c.

Plea, Not guilty.

On the trial before *Park J.* at the *Bedfordshire* Summer assizes, 1838, the counsel for the defendants contended that stat. 4 G. 4. c. 95. s. 68. did not apply to parishes, and that the defendants were consequently not liable to repair the portion in the parish of *Streatley*, to which alone the evidence applied. By consent a verdict was taken for the defendants, with leave to move to enter a verdict for the Crown. In *Michaelmas* term, 1838, *Kelly* obtained a rule accordingly.

1840.

The QUEEN
against
The Inhabit-
ants of
BARTON.

Byles now shewed cause. Sect. 68 of stat. 4 G. 4. c. 95. does not apply to parishes: they are neither bodies "politic or corporate," nor "persons." The liability is imposed there in cases only where particular parties, by tenure or otherwise, were liable to the repair of the old road. The reason of this limitation probably is, that the act applies to turnpike roads only, of which the funds are presumed, *primâ facie*, to be sufficient for the repair of the road. This interpretation is confirmed by the circumstance that in stat. 13 G. 3. c. 84., which applied to highways as well as turnpike roads, the corresponding clause, sect. 63, mentions "*the inhabitants of every such parish, township, or place*, and person or persons, who was, were, or shall be, liable as aforesaid, to the repair of any such old highway or road." When stat. 13 G. 3. c. 84. and stat. 4 G. 4. c. 95. passed statute duty existed: now sect. 63 of the former act mentions statute duty; but sect. 68 of the latter act does not. When private individuals are bound to repair,

1840.
 ———
 The Queen
 against
 The Inhabit-
 ants of
 BARTON.

repair, it is on the ground of their having originally received some consideration for the liability; but this does not apply to parishes: individuals, therefore, might well be fixed with a permanent liability, though the site of the road was changed, but not parishes. Sect. 68 of stat. 4 G. 4. c. 95. provides that, if the parties cannot agree, two justices shall view, and settle the difference. But, in the case of parishes, there are no means of agreeing: no one can bind the parish. And now, by stat. 5 & 6 W. 4. c. 50 (a), the surveyor, in the case of highways not turnpike, has the superintendence of only the roads in his own parish. [*Cole-ridge J.* Do you contend that sect. 68 of stat. 4 G. 4. c. 95. applies only where *both* parties are bodies politic or corporate, or individuals, bound to repair *ratione tenuræ*, &c., and that it does not apply if *either* of the parties be a parish?] The argument must go that length (b).

Sir *W. W. Follett* (with whom were *Kelly* and *Gunning*) contra. The remark made from the Bench is conclusive: the interpretation contended for on the other side would in effect repeal stat. 4 G. 4. c. 95. s. 68. That provision was intended, as appears by the preamble of the section, to obviate doubts which had arisen on the corresponding provision in sect. 63 of stat. 13 G. 3. c. 84.; and it is equally extensive: but it cannot be disputed that

(a) See sect. 6, &c.

(b) *Rex v. Netherthong*, 2 B. & Ald. 179., was also cited in opposition to the rule; and it was contended that no proof had been given, at the trial, of the division having been made either under a writ of *ad quod damnum*, or by order of two justices; but the Court held that, under the particular circumstances of the case, this objection was not open to the defendants at the present step.

stat. 13 G. 3. c. 84. s. 63. comprehended the case of parishes. (He was then stopped by the Court.)

1840.

The QUEEN
against
The Inhabit-
ants of
BARTON.

LORD DENMAN C. J. I have no doubt upon this question, though I was much struck with Mr. *Byles's* remark that the parishes appear to have no authorized agent who can agree for them, as well as by his ingenious arguments as to the variance between the language of the corresponding sections in the two statutes, and the difficulty of carrying the provision into effect in the case of parishes. But the difficulties on the other side are infinitely greater. The legislature cannot have intended to confine the enactment to the case of bodies politic or corporate, or individuals, bound by some special liability to repair in the two parishes respectively. The words of sect. 68 of stat. 4 G. 4. c. 95. are no doubt ill chosen, but we cannot doubt of the intention. The parishes must adapt such means as they have to this intention, as well as they can.

LITLEDALE J. The terms of the enactment certainly do not reach this case: but the meaning of the legislature is clear; and the mischief of a contrary construction would be very great.

COLERIDGE J. (a) concurred.

Rule absolute.

(a) *Williams J.* was absent: see p. 322.

1840.

BENJAMIN *against* BELCHER.

Stat. 6 G. 4. c. 16. s. 127. does not extend to the case where a trader has twice become bankrupt and obtained certificates, not paying 15s. in the pound under the last commission, but both bankruptcies and certificates are prior to the statute. In that case, therefore, the after-acquired effects do not vest in the assignees under the second commission, and the act does not prevent the assignees under a third commission from claiming property of which the bankrupt has had the reputed ownership within sect. 72 since the second commission.

But, if the second certificate were subsequent to May 2d, 1825, when the act took effect as to certificates, sect. 127 applies.

Quære, whether in that case a third commission would be absolutely void.

TROVER for various articles of furniture. Plea, stating that *Israel Alexander*, being a trader within the provisions of stat. 6 G. 4. c. 16., and being indebted &c., became bankrupt; that a fiat issued against him, *December* 19th, 1836, and he was, under such fiat, adjudged a bankrupt; that the defendant was appointed official assignee; and that *I. A.*, when he became bankrupt, had, by the consent and permission of the plaintiff, then being the true owner thereof, in his possession, order, and disposition, the goods in the declaration mentioned, and was reputed owner thereof; wherefore &c.; justification as official assignee.

Replication, that *Israel Alexander*, being a trader, and indebted &c., became bankrupt, and thereupon, viz. *October* 30th, 1809, a commission of bankruptcy issued against him, &c. The proceedings under the commission were stated in detail; and it was alleged that the said *I. A.* was adjudged a bankrupt, surrendered, &c., and conformed himself &c., and afterwards, viz. on *January* 6th, 1810, duly obtained his certificate of conformity under the statutes then in force &c., which certificate was allowed by the Lord Chancellor. And that afterwards &c.: the replication then stated in like manner a subsequent bankruptcy of *I. A.*, commission issued *November* 10th, 1821, adjudication, surrender, &c., and assignment of his estate to *James Harberd*, in trust for the creditors, whereby the estate became vested in *J. H.* as assignee, in trust &c.; conformity by the bankrupt, and certificate obtained by him, *December*

22d, 1821, and allowed *March* 26th, 1822, according to the statutes then in force. Averment, "that the time for making a final dividend of the said bankrupt's estate under the last-mentioned commission elapsed long before the issuing of the fiat in the said last plea mentioned; and that, under the said last-mentioned commission of bankruptcy so issued against the said *I. A.* as last aforesaid, the estate of the said *I. A.* hath not produced sufficient to pay, nor hath he paid, every or any creditor under such commission 15s. in the pound upon, for, and in respect of each pound of the said *I. A.*'s said debts so owing and unpaid at the time of the issuing of the said last-mentioned commission as aforesaid, although a reasonable time in that behalf hath elapsed." And "that the said two several commissions have not, nor hath either of them, been superseded, and the same were issued, and the said proceedings were had thereon respectively, before the passing of the statute for establishing a court in bankruptcy (*a*), and before the issuing the fiat in the said last plea mentioned: and by reason of the premises, and of the statute in that case made and provided, the said fiat in bankruptcy in the said plea mentioned was and is wholly void and of no effect." Verification.

Rejoinder. That the commission of 30th *October* 1809, in the replication first mentioned, was awarded and issued against the said *I. A.*, and he obtained such certificate thereon as in the replication mentioned, before the passing of stat. 6 G. 4. c. 16. And that the commission of 10th *November* 1821, in the replication secondly mentioned, was also awarded and issued against *I. A.*, and *I. A.* obtained such certificate thereon

1840.

—
BENJAMIN
against
BELCHER.

(a) 1 & 2 W. 4. c. 56.

1840.

—
BENJAMIN
against
BELCHER.

as in the replication mentioned, before the passing of the said act. And that the fiat of bankruptcy against *I. A.* in the said plea mentioned, and under which defendant was so appointed the official assignee &c., as in the said plea also mentioned, at the time of the committing of the said supposed grievance &c., was and still is in force and effect, and not in any wise superseded, rescinded, or annulled; without this, that the said fiat in bankruptcy in the said plea mentioned was or is void or of no effect, in manner and form &c. Conclusion to the country.

Demurrer, assigning for causes that the rejoinder is no answer, because stat. 6 G. 4. c. 16. s. 127. has a retrospective effect, and applies as well to commissions of bankruptcy issued before the passing of the said act, as to fiats or commissions of bankruptcy issued after the passing thereof, and that thereby, and by reason of the said retrospective effect of the said statute, and by reason of the said commission of the said 30th *October* 1809, in the replication first mentioned, and of the said commission of 10th *November* 1821, in the replication secondly mentioned, and by reason of the estate of *I. A.* not having produced, after all charges, sufficient to pay every creditor under the said last-mentioned commission 15s. in the pound, all the subsequently acquired estate of the said *I. A.*, including the goods and chattels in the declaration mentioned, vested in the assignees under the last-mentioned commission, and therefore defendant has no right, title, or claim to the said goods &c. Also, that the rejoinder neither confesses, avoids, nor traverses the replication; that the introductory part is argumentative and hypothetical; that the special traverse is taken of inferences of law only; that the introductory

ductory part of the special traverse does not qualify or explain the effect of the traverse as it ought to do; and that neither the inducement nor the traverse are, by themselves, distinct answers to the replication. Joinder.

The demurrer was argued in *Michaelmas* term, 1839 (a).

Erle for the plaintiff. The commission of 1836 was void, by the operation of stat. 6 G. 4. c. 16. s. 127., because there had been two prior commissions against the bankrupt, and his estate had not paid 15s. in the pound under the second. That commission, therefore, was still in force.

There are two classes of cases in which a prior commission has been held to make a subsequent one invalid. First, where the bankrupt had not obtained his certificate under the previous commission; *Martin v. O'Hara* (b); and the reason there given by Lord *Mansfield* and *Buller* J. was, that the second commission would be nugatory, all the estate belonging to the creditors under the first. The judgment of this Court proceeded on the same ground in *Till v. Wilson* (c), though it was urged that, according to a decision (d) later than *Martin v. O'Hara* (b), an uncertificated bankrupt might have a special property in goods acquired by him since the bankruptcy. *Nelson v. Cherrell* (e) and *Phillips v. Hopwood* (g) are cases of the same class. In the courts of equity, the decisions and dicta of Lord *Hardwicke* in

(a) November 15th. Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

(b) 2 *Cowp.* 823.

(c) 7 B. & C. 684.

(d) *Webb v. Fox*, 7 T. R. 391.

(e) 7 *Bing.* 663.; 8 *Bing.* 316.

(g) 1 B. & Ad. 619.

1840.

BENJAMIN
against
BELCHER.

Ex

1840.
 ———
 BENJAMIN
 against
 BELCHER.

Ex parte Proudfoot (a), Lord Loughborough in *Ex parte Brown* (b), and Lord Eldon in *Ex parte Martin* (c), *Ex parte Rhodes* (d), *Ex parte Crew* (e), *Ex parte Lees* (g), and *Ex parte Brown and ex parte Munton* (h), fully establish the invalidity of a second commission where the bankrupt has obtained no certificate under the first. The principle established by these authorities was acted upon in the late case *In the Matter of Chambers* (i). The law upon the subject is discussed, and the cases are collected, in a note to *Summers v. Jones* (k), in the Appendix to 3 *Montague and Ayrton* (l). In *Butts v. Bilke* (m) a question arose whether the pendency of a prior commission made the subsequent one void or merely voidable; but no decision took place. The second class of cases is where the bankrupt has not paid 15s. in the pound under a former commission; and in *Fowler v. Coster* (n), after a full consideration of the authorities, this Court decided that a subsequent commission, under such circumstances, was void: and Sir L. Shadwell, V. C., superseded the commission; *Ex parte Lane, in the Matter of Fowler* (o). He superseded a commission on the same ground in *Ex parte Alexander* (p). It is true that Parke B., in *Summers v. Jones* (q), threw a doubt upon the decision in *Fowler v. Coster* (n); but the current of authority is with it. *Butler v. Hobson* (r) may also be relied upon for the

(a) 1 Atk. 252.

(b) 2 Ves. jun. 67.

(c) 15 Ves. 114.

(d) 15 Ves. 539.

(e) 16 Ves. 236.

(g) 16 Ves. 472.

(h) 1 Ves. & B. 60.

(i) 3 Mont. & Ayr. 294.

(k) 3 Mont. & Ayr. 400.

(l) Page xxi. et seq.

(m) 4 Price, 240. S. C. 2 Rose, 171. note.

(n) 10 B. & C. 427.

(o) Mont. Ca. Bank. 12.

(p) Mont. Ca. Bank. 14. note.

(q) 3 Mont. & Ayr. 400.

(r) 4 New Ca. 290; 5 New Ca. 128.

defendant;

defendant; but the judgment there turned chiefly upon the conduct of the plaintiff, who, as assignee under the second commission, had allowed the bankrupt to have the possession, order, and disposition of the goods; and it seems to have been considered that, in consequence of that permission, there was property on which a third commission could take effect. The decision, if favourable to the present defendant, is opposed to others on the same subject.

Such being the law on these points, it makes no difference here that the first two commissions were issued, and the certificates obtained, before stat. 6 G. 4. c. 16. was passed. Sect. 127. of that act was treated as retrospective in *Fowler v. Coster* (a); and the Court intimated an opinion that it was so in *Robertson v. Score* (b). In those cases the first commission was before, though the second was after, the act. So in *Elston v. Braddick* (c) the bankrupt had been discharged as an insolvent before the act, and had become bankrupt after it passed, paying only 6d. in the pound. Bayley B. there, after commenting on *Fowler v. Coster* (a) and *Robertson v. Score* (b), declared the opinion of the Court to be that sect. 127 was applicable: and that decision was acted upon by the Court of Queen's Bench in *Young v. Rishworth* (d), where both commissions were prior to the act. Stat. 5 G. 2. c. 30. s. 9. is limited to cases in which both discharges are subsequent to the act; but there express words are used.

If it be alleged here, on the principle adopted in *Fowler v. Down* (e), that the bankrupt had a right in property accruing to him after the commission of 1821,

1840.

 BENJAMIN
against
BELCHER.

(a) 10 B. & C. 427.

(b) 3 B. & Ad. 338.

(c) 2 Cro. & M. 435. S. C. 4 Tyr. 122.

(d) 8 A. & E. 470.

(e) 1 B. & P. 44.

1840.
 ———
 BENJAMIN
against
 BELCHER.

against all persons but his assignees, and therefore might have goods upon which the third commission could operate, the answer is that, even according to this argument, the former assignees would still have a title to such goods, and there could not be title in two sets of assignees. It would at least be highly inconvenient that two commissions should co-exist, operating on the same property, and imposing the same duties on the bankrupt with respect to different assignees. But the authorities clearly shew that a latter commission, under circumstances like the present, could not operate on any property, being altogether void.

E. V. Williams, *contra*. First, stat. 6 G. 4. c. 16. s. 127. has not the effect here contended for, when the former commissions, and the certificates under them, are prior to the statute. The first part of sect. 127 describes certain persons; “any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act.” *Fowler v. Coster* (a), *Robertson v. Score* (b), and *Elston v. Braddick* (c) shew that these words include bankrupts who have so compounded or been discharged before the statute passed: and nothing more is to be inferred from those cases. The second branch of sect. 127 points out the consequence of such previous composition or discharge, namely, that, if such person “shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid,” then, “unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such

(a) 10 B. & C. 427.

(b) 3 B. & Ad. 338.

(c) 2 Cro. & M. 435. S. C. 4 Tyr. 122.

certificate

certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade" &c.) "shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission." In this part of the clause all the language is prospective; and the true construction of the whole is, that the clause takes effect where one commission at least is subsequent to the passing of the act, but not where both have preceded it. If this were not so, then, if a party had become bankrupt a second time before the act passed, and had not paid 15s. in the pound, and a creditor had seized his after acquired property under stat. 5 G. 2. c. 30. s. 9., the question would arise whether, under sect. 127 of stat. 6 G. 4. c. 16., the property so taken remained vested in the creditor, or was transferred to the assignee. To avoid such questions, it must be held that sect. 127 operates only where the second commission is subsequent to the statute, and where, consequently, the after acquired property may, without inconsistency, be held to vest in the assignee under that commission absolutely and ab initio. That the effect of sect. 127 is to vest the property so, was laid down in *Ex parte Robinson, in the Matter of Freer* (a). All the authorities before *Young v. Rishworth* (b) are in favour of a construction limiting the words "future estate" to estate acquired after a commission subsequent to stat. 6 G. 4. c. 16.: *Ibberson v. Dicas* (c), *Carew v. Edwards* (d), and *Ex parte Hawley, in the Matter of Richards* (e), where *Elston v. Braddick* (g)

1840.

 BENJAMIN
against
BELCHER.

(a) 1 Mont. & Mac. 44.

(b) 8 A. & E. 470.

(c) Mont. Ca. Bank. 254, note (a).

(d) 4 B. & Ad. 351.

(e) 2 Mont. & Ayr. 426.

(g) 2 Cro. & M. 435. S. C. 4 Tyr. 122.

1840.
 ———
 BENJAMIN
 against
 BELCHER.

was cited, but without effect. *Guthrie v. Boucher* (a) is in point. There the bankrupt had obtained certificates under commissions in 1815 and 1818, and the question was (in 1836), whether the assignees under the second commission had any claim to certain after-acquired property. *Fowler v. Coster* (b) and *Elston v. Braddick* (c) were cited. Sir L. Shadwell V. C. said, "There is no difficulty in this case. There is no inconsistency between the decisions in the Court of Exchequer and the Court of King's Bench. In the case in the King's Bench, both the bankruptcies happened before the passing of the act, and the Court held that the statute did not apply: but, in the case before the Court of Exchequer, one of the bankruptcies happened before, and the other after the passing of the act; and, in that case, the Court held that the statute did apply. Both decisions are right and consistent with each other. In order to make the statute apply, there must have been a bankruptcy after the passing of the act.—[His Honor here read the 127th section of the act.]—I admit that there is a surplusage of words in that section. But it appears to me that the person who drew the act, when he used the words 'shall have obtained,' carried his mind forward to a certificate to be obtained under the act which he was preparing. In the present case there was no bankruptcy subsequent to the passing of the act; and the consequence is that there can be no vesting in the assignees." [*Patteson* J. The judgment makes the words "shall hereafter obtain" unmeaning.] In *Robertson v. Score* (d) the first commission was before, the second after, the statute. *Elston v. Braddick* (c) is cited

(a) 8 Sim. 248.

(b) 10 B. & C. 427.

(c) 2 Cro. & M. 435. S. C. 4 Tyr. 122.

(d) 3 B. & Ad. 338.

as an authority for the plaintiff; but there the commission under which the estate failed to pay 15s. was subsequent to the statute; the real question was only on the first branch of sect. 127. When *Bayley B.* said there (according to the report in *Tyrwhitt (a)*), "The act is prospective in applying to future certificates, but a previous discharge under a previous act is not inconsistent with its provisions," it was sufficient if the dictum applied to the case of a previous single discharge, the question turning simply on the first branch of the section. *Bayley B.* in his judgment, according to the same report (*b*), says: "The question is, whether the words in the early part of 6 G. 4. c. 16. s. 127. are confined to discharges by bankruptcy or insolvency occurring after the passing of that act? or whether they also comprise discharges happening before that period?" His Lordship adopts the latter opinion; but if, in doing so, he decided that the section applied where there were two bankruptcies and certificates prior to the act, the estate not paying 15s. on the second bankruptcy, his decision was contrary to that in *Carew v. Edwards (c)*, which case, however, though cited at the bar, is not overruled, nor even mentioned in his judgment. The learned Baron's observations are, in truth, directed merely to the argument of the defendant's counsel, who contended that sect. 127 did not apply even to the case of a single prior commission. *Young v. Rishworth (d)* is a case in which both commissions were issued before the act came into operation; and it was held that a debt due to the bankrupt at a subsequent time vested in the assignees under the second commission. But the judg-

1840.

 BENJAMIN
against
BELCHER.

(a) 4 Tyr. 125.

(b) 4 Tyr. 127.

(c) 4 B. & Ad. 351.

(d) 8 A. & E. 470.

1840.
 ———
 BENJAMIN
 against
 BELCHER.

ment there was grounded on *Elston v. Braddick* (a), which, if the present argument be correct, does not go far enough to bear out such a decision. And in *Young v. Rishworth* (b), the certificate under the second commission was obtained after stat. 6 G. 4. c. 16. came into operation. Either the case is distinguished by that circumstance from others in which the two commissions have preceded the act, or the decision, as opposed to several authorities, demands reconsideration.

Secondly, even if the latter part of sect. 127 be retrospective, it does not follow that the third commission is absolutely void. The ground on which this result has been supposed to follow is, that no property exists upon which a third commission can operate. But then a question arises, which does not appear to have been much considered before the argument of Sir *George Rose* in *Ex parte Welsh, in the Matter of Merryweather* (c), namely, what, under the statute, is the situation of property after-acquired and in the disposition of the bankrupt? Such property would not vest in the assignees under the second commission by sect. 72, because that clause, though it gives the commissioners power over goods in the bankrupt's disposition, applies only to those which are so "at the time he becomes bankrupt." Then, if the assignees permit him to trade and thereby acquire goods, which, it has been held (d), would be property under his controul and disposition by consent of the true owner, can it be said that this shall neither be distributable under the second commission, nor become subject to a third? If so, a bankrupt within

(a) 2 Cro. & M. 435. S. C. 4 Tyr. 122.

(b) 8 A. & E. 470.

(c) *Mont. Ca. Bank*. 276.

(d) See *Butler v. Hobson*, 4 New Ca. 290.

the 127th section is more advantageously situated than another trader. It seems, therefore, that there may be circumstances under which the third commission would be necessary, and valid if issued. And in *Ex parte Welsh, in the Matter of Merryweather* (a), where, under a second commission in 1826, 15s. had not been paid, Lord Brougham C. refused to supersede a third commission, and said that he could not adopt the dicta in the Court of King's Bench denying the power of the Lord Chancellor to issue such third commission. The authorities on the subject are very fully examined in a note by the learned reporter on that case (b). In *Ex parte Hawley, in the Matter of Richards* (c), Lord Brougham decided against a petition founded on the supposed retrospective effect of sect. 127, where the second commission was prior to the statute; and he said (d), "I think *Fowler v. Coster* (e) was decided before the King's Bench had the decision in *Ex parte Welsh* (a) before them." The Court of Exchequer seems, in *Summers v. Jones* (g), to have thought the former decisions of the Exchequer, King's Bench, and Common Pleas, upon this subject, still open to discussion; and Parke B. declared that he doubted the correctness of the judgment in which he had concurred, in *Fowler v. Coster* (e). And subsequently, in *Butler v. Hobson* (h), the Court of Common Pleas expressly decided that a third fiat was not a nullity where the bankrupt, not having paid 15s. under a second commission, had been suffered by the assignees under that commission to acquire property by a new trading. The summary of cases in the Appendix to 3 *Montague and Ayrton* (i),

1840.

 BENJAMIN
against
BELCHER.
(a) *Mont. Ca. Bank.* 276.(c) 2 *Mont. & Ayr.* 426.(e) 10 *B. & C.* 427.(h) 5 *New Ca.* 128.(b) *Mont. Ca. Bank.* 280. note (a).

(d) Page 431.

(g) 3 *Mont. & Ayr.* 400.(i) 3 *Mont. & Ayr.* xxi. et seq.

1840. referred to on the other side, concludes with observations favourable to a third commission.

BENJAMIN
against
BELCHER.

Knowles (in the absence of *Erle*), in reply. *Young v. Rishworth* (a) is entitled to authority as a judgment of this Court given on deliberation, and founded on the previous decision in *Elston v. Braddick* (b), as to which the two reports which have been cited do not substantially differ. There is no reason for the suggested division of sect. 127 into two clauses, retrospective and prospective, at the words "shall have been discharged by any insolvent act;" and some meaning must be ascribed to all the words, "have obtained or shall hereafter obtain." When *Bayley B.*, said, in *Elston v. Braddick* (b), that the question turned upon the early part of the section, he was referring to the difficulty, which he discusses, on the meaning of the words "such certificate as aforesaid." [*Patteson J.* We must look to the facts of the case. The commission under which 15s. had not been paid was subsequent to the statute.] *Carew v. Edwards* (c) was brought to the notice of this Court in *Young v. Rishworth* (a). In *Ex parte Hawley* (d) the Lord Chancellor gave no reason for his decision; and that case was cited without effect in *Young v. Rishworth* (a). [*Patteson J.* *Carew v. Edwards* (c) was decided on the express protection given to creditors' rights in stat. 6 G. 4. c. 16. s. 135. There is no case in which it has been necessary to give effect to the words "shall" "have obtained" in sect. 127. *Young v. Rishworth* (a) and *Elston v. Braddick* (b) turned upon the words "shall hereafter obtain."] The difficulty suggested, as to the

(a) 8 A. & E. 470.

(b) 2 Cro. & M. 435. S. C. 4 Tyr. 122.

(c) 4 B. & Ad. 351.

(d) 2 Mont. & Ayr. 426.

situation of after-acquired property if a third commission cannot issue, would have occurred under stat. 5 G. 2. c. 30. s. 9.; yet it has been established, by a series of decisions under that act, that no such commission could issue. Those decisions cannot have gone merely upon the ground that there was no property for the commission to act upon; there are many cases in which it would have been clearly otherwise. When the present question was decided in *Butler v. Hobson* (a) the point does not seem to have been fully discussed (b); and in the judgment of the Court only two cases were cited upon it, and no notice taken of *Nelson v. Cherrell* (c), where the Court of Common Pleas held it too clear for argument that a commission could not be supported while the bankrupt was uncertificated under a prior commission. [Patteson J. The marginal statement in *Nelson v. Cherrell* (d), that "a second commission of bankrupt is void while a former one *remains in force*," is clearly incorrect; otherwise there could be no second commission while any thing remained undistributed under a first.] A difficulty is raised on the other side, as to goods of which there may be a reputed ownership within stat. 6 G. 4. c. 16. s. 72.; but that section relates to goods possessed by a "bankrupt, at the time he becomes bankrupt;" and, if the plaintiff's view of the statute be correct, a party in one of the predicaments described by sect. 127 cannot become bankrupt, all his estate being vested in the assignees under the second commission. [Patteson J. This argument begs the question, by assuming that a man cannot become bank-

1840.

 BENJAMIN
against
BELCHER.

(a) 5 New Ca. 128.

(b) But see *Butler v. Hobson*, 4 New Ca. 295.

(c) 7 Bing. 663.; 8 Bing. 316. (d) 7 Bing. 663.

rupt

1840. rupt without having property. The act requires only that he should be a trader.]

BENJAMIN
against
BELCHER.

Cur. adv. vult.

Lord DENMAN C. J. in this term (*January 24th*) delivered the judgment of the Court.

This was an action of trover. The defendant pleaded a fiat in bankruptcy, dated 19th *December* 1836, against *Israel Alexander*, under which he was appointed assignee; that *Israel Alexander* at the time he became bankrupt had, by the consent and permission of the plaintiff then being the true owner thereof, in his possession, order, and disposition, the goods in the declaration mentioned, and was reputed owner thereof. The plaintiff replied a commission of bankrupt against *Israel Alexander*, dated 30th *October* 1809, under which he obtained his certificate on the 6th *January* 1810; also a second commission of bankrupt against *Israel Alexander*, dated 10th *November* 1821, under which the plaintiff (a) was appointed assignee, and under which *Israel Alexander* obtained his certificate on 22d *December* 1821, and that the estate did not produce 15s. in the pound, and, so, that the fiat in *December* 1836 was void. The defendant rejoined that both the commissions and the certificates under them were before the passing of stat. 6 G. 4. c. 16., without this that the fiat in *December* 1836 was void. To this the plaintiff demurred. The dates mentioned in the replication are laid under vide licets, but the precise dates are not material: the rejoinder states that both certificates were *before* the passing of 6 G. 4. c. 16., which raises the points in this case.

The plaintiff's argument is founded on the 127th sec-

(a) See page 350. *antè*.

tion

tion of that act, by which he contends that the future effects of *Israel Alexander*, acquired since his certificate on 22d *December* 1821, were vested in the plaintiff as assignee under the second commission, by reason of which the fiat of *December* 1836 was void. The defendant contends that, as both the certificates were before the passing of 6 G. 4. c. 16., the 127th section of that act does not apply; but that the future effects of the bankrupt were his property, although liable to be taken in execution by his former creditors by force of the statute 5 G. 2. c. 30. s. 9. He also further contends that, if the 127th section of 6 G. 4. c. 16. does apply, still the fiat of *December* 1836 is not void.

Several authorities were cited as to the construction of the 127th section of the act in question, which, though at first sight they may appear conflicting, will, upon examination, be found to be entirely consistent with each other. When the second certificate was obtained, and from that time up to the passing of 6 G. 4. c. 16. in 1825, it is clear that the bankrupt was capable of acquiring property, that his future effects did not vest in his assignee, and that they were liable to any creditor who sued him: his person, tools, necessary furniture, and wearing apparel only being protected by his certificate. Therefore, without doubt, up to the passing of 6 G. 4. c. 16., a third commission of bankrupt might have been sued out against him, provided he was a trader and there was a sufficient petitioning creditor's debt and act of bankruptcy. This being the state of things, it is said that the 127th section has a retrospective operation, so as to alter altogether the effect of the certificate of 22d *December* 1821, and to make void any thing that has occurred, even a third commission of bankrupt, if any such had issued in the interim, on the faith

1840.

 BENJAMIN
against
BELCHER.

1840.

—
BENJAMIN
against
BELCHER.

faith of the existing law, 5 G. 2. c. 30. s. 9. No case has yet decided any such thing. In all of them, except *Carew v. Edwards* (a), *Ex parte Hawley* (b), and *Baggeley v. Nicholls* (c), the second certificate was obtained subsequently to the passing of the 6 G. 4. c. 16. In *Carew v. Edwards* (a) the Court decided that the 127th section did not apply where the second certificate was before the passing of 6 G. 4., relying on the 135th section, which provides that the rights of parties shall not be affected except when it is so *specifically* enacted. In *Ex parte Hawley* (b) the Lord Chancellor took the same view of the section. In *Baggeley v. Nicholls* (c) the Court directed a new trial, in order that the points might be raised on the record, but the action was compromised.

It was said by counsel, in arguing *Elston v. Brad-dick* (d), that the Court of King's Bench were divided in opinion on the construction of this clause in *Baggeley v. Nicholls* (c). Now the distinction between cases where the second certificate was before, and those where it was after, 6 G. 4. c. 16. was taken in that case undoubtedly, but not mainly relied on; and the division of opinion was rather upon the point whether, supposing the 127th section to apply, the third commission was *void* or not.

The section in question enacts that, "if any person

(a) 4 B. & Ad. 351.

(b) 2 Mont. & Ayr. 426.

(c) K. B. Mich. T. 1832. not reported. The case was argued, on motion to set aside a nonsuit, and for a new trial, (November 8th, 1832,) before Denman C. J., Parke, Taunton, and Patteson Js. Sir J. Scarlett and Follett shewed cause, and F. Pollock and Bliss supported the rule. *Ex parte Welsh*, Mont. Ca. Bank. 276. was relied upon for the plaintiff. In the same term (November 26th) Denman C. J. gave judgment, saying only, "This is a case of such grave importance and so much doubt, that we set aside the nonsuit, in order that the parties may have an opportunity of raising the question upon the record for a higher tribunal." Rule absolute for a new trial, unless the parties agree to a special verdict.

(d) 2 Cro. & M. 441.

who

who shall have been so *discharged by such certificate as aforesaid*," "shall be or become bankrupt, and *have obtained or shall* hereafter obtain such certificate as aforesaid, unless his estate shall produce" 15s. in the pound, his future effects shall vest in his assignees, &c. These words, literally taken, seem to make it necessary that even the *first* certificate should be subsequent to the act, for they are "such certificate as aforesaid," viz. that described in the act, which is different as to number of creditors from that under the 5 G. 2. c. 30. (a), and yet the subsequent words "have obtained," which relate to a *second* certificate, are at first sight applicable to one obtained before the act. If so, the second certificate, which is to be qualified by what has happened before, may be earlier in date than that which is to qualify it, which is absurd. But it should seem that the words "have obtained" are really nothing more, grammatically, than "shall have obtained," following the conjunction "if," and that the expressions "have obtained," thus construed, and "or shall hereafter obtain," mean in truth the same thing, and are merely redundant; and then the only real difficulty in construing the 127th section will appear to arise from the words "such certificate as *aforesaid*," upon which we will observe hereafter.

The 135th section seems to furnish a very good clue to the intention of the legislature. It enacts "that nothing herein contained shall render invalid any commission of bankruptcy now subsisting or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand or remedy which any person now has thereunder, or upon or

1840.

 BENJAMIN
against
BELCHER.

(a) Sect. 10. See stat. 49 G. 3. c. 121. s. 18.

against

1840.

BENJAMIN
against
BELCHER.

against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted." If the plaintiff's construction of the 127th section be the correct one, it *would* render invalid a third commission of bankruptcy (the bankrupt having his certificate under a second, but not having paid 15*s.* in the pound under it), which was subsisting at the passing of the act; it *would* render invalid the proceedings under such commission; it *would* affect the rights and remedies of the creditors *against* a bankrupt who had obtained his certificate under a second commission, and not paid 15*s.* in the pound, no matter how long before the act; for it would take from them the power of suing the bankrupt and seizing his future effects in execution: nay more, it would make them, if they had done so, liable to refund to the assignees. It *would* also affect the rights of the bankrupt himself, although it may be questionable whether he is protected by this section; for, whereas he would have been legally acquiring property ever since his certificate, subject only to be sued by his creditors in respect of it, the 127th section would at once take away all that property from him, and disable him from acquiring any other till his creditors were paid 20*s.* in the pound, and all this without the legislature having specifically enacted to that effect. Words could hardly be found more indicative of an intention not to disturb existing rights than those used in the 135th section; and it seems absolutely necessary, in order to effectuate such intention, to reject altogether the words "have obtained, or" in the middle of the 127th section, or to read those words as "shall have obtained," in the manner above suggested, and to confine that section to cases of certificates under a second commission

commission obtained after the passing of the act: and so this Court held in *Carew v. Edwards* (a).

It is, however, strongly urged that the section in question must be construed *retrospectively*, and that the words "*such certificate as aforesaid*," which there first occur, must be taken to mean any certificate, whether under 5 G. 2. c. 30. or 6 G. 4. c. 16.; for the legislature obviously intended to prevent races between creditors for the bankrupt's future effects, and to vest them in the assignees in order to their being rateably distributed, as more beneficial to them: and the 135th section enacts that "this act shall be construed beneficially for creditors." Also it is urged that, when the legislature meant to confine the enactment to cases where the first certificate was after the act, as under 5 G. 2. c. 30., they did so in express terms. Also it is urged that the words "or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act," which immediately follow "*such certificate as aforesaid*," are not in any way restricted to compositions or discharges subsequent to 6 G. 4.: why therefore should the obtaining a certificate be so restricted?

These reasons seem very satisfactory, and abundantly sufficient for holding that the 127th section may operate where the *first* certificate was before the act; but the section is not therefore *retrospective*; and it seems that the use of that word in some of the decided cases is unfortunate, and has led to arguments which were not foreseen. In its true construction, and that which has hitherto been given to it, the section is really *prospective* only: it applies to *subsequent certificates* only as regards

1840.

 BENJAMIN
against
BELCHER.

(a) 4 B. & Ad. 351.

1840.

BENJAMIN
against
BELCHER.

the vesting of the bankrupt's future effects in the assignees; and it describes the predicament in which the bankrupt must stand when he obtains that subsequent certificate; namely, that, at that subsequent time, he must be in the predicament of having at some previous time been discharged by a certificate under the then bankrupt law, or having compounded with his creditors, or been discharged under an Insolvent Act. It in no way affects or alters the qualities or incidents of such former discharges or compositions. It does not render any thing which has happened before the act different in its operation from what it would have been had the act never been passed. It is prospective only, although it gives to a certificate obtained subsequently to the passing of the act, by a person who at *that time* stands in a particular specified predicament, an effect different from that which any previous act had given. Now the cases are all perfectly consistent with this view of the section in question. In *Fowler v. Coster* (a) the first certificate was before 6 G. 4. c. 16.; the second was after it: and the question was as to the validity of a third commission. The Court undoubtedly considered that the section in question applied, though the point was not argued. In *Robertson v. Score* (b) the Court, under the same circumstances, inclined to a similar opinion; but it was unnecessary to determine the point, because, if the section did apply, their opinion was for the defendant; and, if it did not apply, all parties agreed that the decision must be for the defendant. In *Baggeley v. Nicholls* (c), as already observed, this point was not made the leading one; and the case was sent to a

(a) 10 B. & C. 427.

(b) 3 B. & Ad. 338.

(c) See p. 366. note (c), *antè*.

new trial to raise the questions in a more solemn form. In *Carew v. Edwards* (a) both certificates were before the 6 G. 4. c. 16.; and the Court held that the 127th section did *not* apply, founding their decision upon the 135th section, as indicative of the intention of the legislature. In *Ex parte Hawley* (b) both certificates were before 6 G. 4. c. 16.; and Lord Chancellor Brougham took the same view as this Court did in *Carew v. Edwards* (a), and held that the 127th section did not apply. In *Elston v. Braddick* (c) the first certificate was before, the second commission and certificate after, the 6 G. 4. c. 16. The Court of Exchequer decided that the 127th section did apply; and we quite agree with that decision: but it is no authority whatever for saying that it would apply if the second certificate had been before 6 G. 4. c. 16. The case of *Carew v. Edwards* (a) was cited at the bar; but the Court, in giving judgment, take no notice of it. And, if due attention be paid to the different state of facts, it will be plain that the two cases are not conflicting. Then comes the case of *Young v. Rishworth* (d), in which this Court held that the 127th section did apply: but there the second *certificate* was *after* 6 G. 4. c. 16. came into operation, viz. in *April* 1826, although the second *commission* was between the passing of the act (*May* 2d, 1825) and its coming into *general* operation (*September* 1st, 1825), namely, on 20th *May* 1825: but it should be recollected that the 6 G. 4. c. 16. came into operation *as to certificates* immediately on its passing. See section 136. The Court in this last case use the term *retrospective*, and certainly seem to treat the point now under discussion as determined

1840.

 BENJAMIN
 against
 BELCHER.

(a) 4 B. & Ad. 351.

(b) 2 Mont. & Agr. 426.

(c) 2 Cr. & M. 435. S. C. 4 Tyr. 122.

(d) 8 A. & E. 470.

1840. by *Elston v. Braddick* (a): but, on attending to the dates in both cases, it becomes clear that the point was not involved in either of them. In *Butler v. Hobson* (b) the first commission was before, the second after, 6 G. 4. c. 16.: and it was held that the section did apply; in which we quite agree.

BENJAMIN
against
BELCHER.

For these reasons we are of opinion that in this case the 127th section of 6 G. 4. c. 16. does not apply; that the bankrupt after his second certificate was capable of acquiring property; and of course that the subsequent fiat in bankruptcy was good.

The other point, viz. whether a fiat against a person to whom the 127th section does apply is void or not, does not arise. It is better to abstain from giving any opinion whatever upon a question of so much difficulty, until it becomes necessary for settling the rights of the parties.

The judgment must be for the defendant.

Judgment for defendant.

(a) 2 Cro. & M. 435. S. C. 4 Tyr. 122.

(b) 4 New C. 290.; 5 New C. 128.

1840.

CHRISTIE, Assignee of the Estate of ELLIOTT, a Bankrupt, against UNWIN and Another. *Saturday, January 18th.*

TROVER by assignee for goods converted after the bankruptcy. Pleas. 1. Not guilty. 2. That *Elliott* was not a bankrupt, in manner &c. 3. That plaintiff was not lawfully possessed as assignee &c. Issues thereon. Notice of disputing the petitioning creditor's debt, and the act of bankruptcy.

On the trial before *Bosanquet J.*, at the *Nottingham* Summer assizes, 1838, it appeared that the commission against *Elliott* had been proceeded in by an order of the Lord Chancellor, made under stat. 6 G. 4. c. 16. s. 18. (a), in the following words.

"In Bankruptcy. } *Wednesday, the 31st day of*
Court of Review. } *January, 1838.*

In the matter of *Thomas Elliott*, a bankrupt.

Whereas *George Hall*, of *Manchester* in the county of *Lancaster*, gentleman, one of the public registered

of the bankrupt," and that their debt "proved under the fiat," or so much thereof as was sufficient to support such fiat, was incurred not anterior to the debt of the petitioning creditor.

Where the order stated such application made by *B.*, and that the debt of *C.*, the petitioning creditor, was insufficient to support the fiat, and that the debt of *B.*, proved under the fiat, was incurred not anterior to the said debt of *B.* (instead of "*C.*"): Held, that the words "of *B.*" might be rejected as surplusage, and that the order sufficiently shewed *B.*'s debt to be not anterior to that of the petitioning creditor.

(a) Stat. 6 G. 4. c. 16. s. 18. enacts, "That if after adjudication the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid."

1840.

CHRISTIE
against
UNWIN.

officers of certain persons united in copartnership for the purpose of carrying on business as bankers in *Manchester* and elsewhere, under the provisions of a certain act of parliament made and passed in the seventh year of the reign of his late Majesty King *George IV.*, intituled An act for the better regulating copartnerships of certain bankers in *England*, and for other purposes in the title of the act mentioned, and under the name of The Northern and Central Bank of *England*, which said persons so united in partnership were creditors of the above named bankrupt, did, on or about the 17th day of *January* instant, prefer unto this Court his petition in the above matter, praying that the fiat against the said *Thomas Elliott* in the said petition mentioned might be ordered to be proceeded in, and that the costs of the said petitioner by reason of the said application, and incidental thereto, and also the costs of the meeting of the commissioners, as therein mentioned, might be directed to be paid by *Hector Christie*, therein also mentioned, out of the estate and effects of the said *Thomas Elliott*. Now, upon hearing the said petition, and the affidavit of *Hugh Bruce Campbell*, filed in support thereof, read, and what was alleged by Mr. *Hurd* of counsel for the said petitioner, by Mr. *Kenyon S. Parker* of counsel for *Hector Christie*, the sole assignee of the estate of the said bankrupt, and by Mr. *Bacon* of counsel for *Malcolm Sinclair* and *Thomas Binyon*, the assignees of the estate of *James Cropper* a bankrupt, the petitioning creditor under the said fiat against the said *T. E.*, this Court does declare that the debt of the said *James Cropper*, the petitioning creditor, and on which the adjudication of the bankruptcy of the said *T. E.* was made,

is

is (a) an insufficient debt to support the fiat issued against the said *T. E.*; and, it appearing to the Court that the debt of the said Northern and Central Bank of *England*, proved under the fiat against the said *T. E.*, or so much thereof as was sufficient to support such fiat, was so incurred not anterior to the said debt of the said banking company, and was an existing and sufficient debt to support the said fiat, the Court does order that the said fiat issued against the said *T. E.* be proceeded in, and that the costs of the said petitioner and of the said *Hector Christie*, of and occasioned by the said petition, be paid out of the estate of the said bankrupt *T. E.*, and that the costs of the said *Malcolm Sinclair* and *Thomas Binyon* be paid out of the estate of the said bankrupt *James Cropper*, and that such several and respective costs be taxed by the commissioners under the said respective fiats under which the said respondents were respectively assignees; but this order is not to prejudice any action pending under the said fiat against the said *T. E.*

1840.

 CHRISTIE
 against
 UNWIN.

By the Court."

Several objections were taken on behalf of the defendant (b); among others, that the order did not purport to be made on the application of any creditor "having proved" a sufficient debt before applying; and that the debt of the Northern and Central Bank of *England* did not appear on the face of the order to "have been incurred not anterior to the debt" of the petitioning creditor. *Muskett v. Drummond* (c) was cited. On the latter point it was contended, for the plaintiff,

(a) See p. 377. post, note (b).

(b) See the argument on shewing cause, p. 376. post.

(c) 10 *B. & C.* 153.

1840.

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 CHARLOTTE
 against
 UNWIN.

that the material fact appeared sufficiently, if the words "of the said banking company" were rejected as surplusage. The learned Judge held that, as the bankruptcy could stand only upon the eighteenth section of stat. 6 G. 4. c. 16., and that clause gave a peculiar jurisdiction to the Lord Chancellor under certain circumstances, the facts necessary to sustain the jurisdiction ought to appear expressly on the face of the order; that they did not sufficiently appear in this case; and therefore that the plaintiff must be nonsuited.

Goulburn Serjt., in the ensuing term, obtained a rule nisi for a new trial.

Whitehurst now shewed cause. An order of this kind must be not only well grounded, but valid on the face of it: here the order is bad in several respects. 1. It does not shew that *Hall* applied for the order on behalf of any creditor or creditors. 2. Assuming that to be shewn, it does not appear that the persons on whose behalf application was made were creditors at the time. 3. The order is not stated to have been made after adjudication. [*Coleridge* J. Does not the averment that *Christie* was sole assignee import this?] 4. The debt is not stated to have been found insufficient after adjudication. 5. The petition, as recited, does not shew that the debt of the petitioners was "not anterior" to the debt of the original petitioning creditor. This might perhaps appear on reference to the petition; but the order of the Court of Review ought to shew in itself that it proceeds on a valid ground. A good information would not support a defective conviction. 6. Assuming that *Hall* applied on behalf of the Bank, it
 does

does not appear by the order that, at the time of application, the Bank had proved a debt sufficient to support a commission. 7. The order does not explicitly state that the petitioning creditor's debt is "found insufficient."

Muskett v. Drummond (a) shews the necessity of such a finding (b). 8. The order finds that the debt of the Bank proved under the fiat against *Elliott*, "or so much thereof as was sufficient to support such fiat, was so incurred not anterior to the said debt of the said banking company." It ought to have appeared that the debt was "not anterior" to that of *James Cropper*; and that the whole debt was "not anterior." The plaintiff contends that the words "of the said banking company" may be rejected as surplusage; but there is no authority for this.

1840.

CHRISTIE
against
UNWIN.

Goulburn Serjt. and Humfrey, contra. As to the last objection; the Court, in reading the order, may stop at the words "not anterior to the said debt," and leave out the subsequent ones, which make nonsense. [Lord Denman C. J. We are with you on that point.] It is not necessary that a decree like this should set forth in terms all the facts on which it is grounded. Although it is not expressly stated that, when the application was made, the Bank had proved a sufficient debt, they must in truth have done so, or the Lord Chancellor would have made an unauthorised order, which is not to be presumed. And the fact appears, by reasonable implication, from the words "which said persons" "were

(a) 10 B. & C. 153.

(b) The copy of the order used by the defendants' counsel had the words "this Court does declare that the debt" &c. "was an insufficient debt." The plaintiff's counsel contended that the original stood "is an insufficient" &c.

1840.

CHRISTIE
against
UNWIN.

creditors of the above named bankrupt," and "it appearing to the Court that the debt of the said Northern and Central Bank of *England*, proved under the fiat," "or so much thereof as was sufficient to support such fiat, was so incurred not anterior" &c., "and was an existing and sufficient debt to support the said fiat." Had any real question existed as to the fact, there would have been no difficulty in proving it at the trial. [*Coleridge J.* The same might probably have been said in *Muskett v. Drummond* (a)]. The petition itself shewed it. [*Lord Denman C. J.* The petition can be referred to so far only as it is recited in the order.] The statute 6 G. 4. c. 16. s. 18. points out who may be petitioners; the order is sufficient if it shews that there was a petition, and that an order is made thereupon; as a rule of court is drawn up "on reading the affidavits" of parties, without specifying the contents of the affidavits. [*Coleridge J.* Every thing that gives jurisdiction should appear in the order, either directly or by recital.] It must have been stated in the petition that the Bank had proved their debt before they petitioned: otherwise the Lord Chancellor could not have known the fact, and would not have substituted the debt. The Court will assume any thing that can fairly be intended in support of the order. [*Coleridge J.* Your argument would shew that every thing might be assumed.]

LORD DENMAN C. J. It is clear, as the learned Judge held at the trial, that the order ought to be sufficient, on its face, to shew the authority for making it. Many objections have been taken to this order. All of

(a) 10 B. & C. 153.

them,

them, probably, may be got over, except this, that the application, under sect. 18, ought to be made by creditors "having proved any debt or debts sufficient to support a commission." The clause seems to have been construed here as if it were enough that the creditor should have proved at the time when the order is made; but any one who reads the clause with common attention must see that no creditor can apply to the Lord Chancellor unless he has first proved a debt sufficient to support a commission. The present order does not shew that. The rule must therefore be discharged.

1840.

CHRISTIE
against
UNWIN.

LITLEDALE J. It does not appear by this order that the debt had been proved as sect. 18 requires. It is argued that the petition would supply that fact; but we cannot call in the petition to support the order, any further than as the order recites it. It is true that the persons carrying on the bank are stated to be creditors: but it does not follow that they had proved before making the application.

COLERIDGE J. (a). I am of the same opinion. We cannot intend for or against the order, but must decide according to the words. However high the authority may be, where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of peace, the facts which gave the authority must be stated.

Rule discharged.

(a) *Williams J. was on the special commission at Monmouth.*

1840.

*Saturday,
January 18th.*

HANNAH WILSON PADMORE *against* LAWRENCE.

Defendant, in the presence of a third person, not an officer of justice, charged plaintiff with having stolen his property, and afterwards repeated the charge to another person, also not an officer of justice, who was called in to search the plaintiff with the consent of the latter.

Held, that the charge was privileged, if the defendant believed in its truth, acted *bonâ fide*, and did not make the charge before more persons, or in stronger language, than was necessary; and that it was a question for the jury, and not the judge, whether the facts brought the case within this rule.

CASE for slander. The words charged to have been spoken by the defendant imputed that the plaintiff had stolen a brooch belonging to the defendant's wife; and they were said to have been uttered in a discourse &c., and in the hearing of one *Jane Cole* and divers &c.

Pleas. 1. Not guilty. 2. A traverse of part of the inducement not material here.

On the trial before *Parke B.* at the *Hampshire* summer assizes, 1838, it appeared that the plaintiff had called at the defendant's house, and that soon afterwards the brooch was missed; that defendant then went to an inn, where the plaintiff was, and stated to her his suspicions, in the presence of a third person; and that the plaintiff, with her own concurrence, was afterwards searched by *Jane Cole* and another female, who were called in for the purpose, and to whom the defendant at the time repeated the charge. The brooch was not found on the plaintiff, but was afterwards discovered to have been left by the defendant's wife at another place. The defendant's counsel first applied for a nonsuit, which the learned Judge refused. The defendant's counsel then, in his address to the jury, contended that the words were spoken without malice, under circumstances which privileged them. The learned Judge told the jury that the verdict must be for the plaintiff, if they thought that the words imputed felony, for that it was clear they were not privileged. Verdict for the plaintiff.

In

In *Michaelmas* term, 1838, *Erle* obtained a rule for a new trial on the ground of misdirection.

1840.

PADMORE
against
LAWRENCE.

Crowder and *Butt* now shewed cause. No justification was on the record: and the defence rested entirely on the question whether or not the charge was made under circumstances which privileged it, so as to negative malice, and be available under the plea of Not guilty. The Judge is the proper authority to determine this question: and he has determined it rightly; for the suspicion entertained by the defendant did not entitle him to charge the plaintiff with felony in the presence of private individuals. Had the charge been true, or had it been made only before a magistrate, or even a policeman, it might have been otherwise.

Erle and *Barstow*, contra. *Toogood v. Spyring* (a) shews that the presence of a third party does not necessarily take away privilege from a communication between the plaintiff and defendant, if it would be privileged otherwise. A jury, indeed, might find that the charge was made with a motive, or under circumstances, which took the case out of the privilege; but there was nothing in this case upon which the Judge could negative the privilege absolutely as a point of law. This is consistent with all the cases; *Fowler v. Homer* (b), *Kine v. Sewell* (c), *Blake v. Pilfold* (d), *Finden v. Westlake* (e), *Martin v. Strong* (g), *Bromage v. Prosser* (h), *Wright v.*

(a) 1 C. M. & R. 181. S. C. 4 Tyr. 582.

(c) 3 M. & W. 297.

(e) Moo. & M. 461.

(h) 4 B. & C. 247.

(b) 3 Campb. 294.

(d) 1 Moo. & R. 198.

(g) 5 A. & E. 535.

Woodgate

1840. *Woodgate* (a). *Delany v. Jones* (b) goes farther still: but the authority of that case has been doubted (c).

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PADMORE
against
LAWRENCE.

LORD DENMAN C. J. The question ought to have gone to the jury, whether this charge was made *bonâ fide*. Unless *Toogood v. Spyring* (d) is to be overruled, it is clear that the Judge was not warranted in withdrawing that question from their consideration.

LITLEDALE J. The jury were to say whether the defendant believed that the brooch was stolen by the plaintiff, and for that reason charged her with having stolen it, and whether his language was stronger than necessary, or whether the charge was made before more persons than was necessary. The law has been laid down so over and over again.

COLERIDGE J. (e). For the sake of public justice, charges and communications, which would otherwise be slanderous, are protected if *bonâ fide* made in the prosecution of an inquiry into a suspected crime. Then had not the defendant a right to make out that case? The facts were for the jury. It is argued that the charge ought to be true, or ought to be made only before an officer of justice. But the exigencies of society could never permit such a restriction. If I stop a party suspected, must not I say why I do so? Supposing it unjustifiable to search a person against his will, here the

(a) 2 C. M. & R. 573. S. C. Tyr. & Gr. 12.

(b) 4 Esp. 191.

(c) See *Lay v. Lawson*, 4 A. & E. 795.

(d) 1 C. M. & R. 181. S. C. 4 Tyr. 582.

(e) *Williams J.* was absent: see p. 379, *antè*.

plaintiff

plaintiff agreed to be searched. The presence of other parties would not do away with the privilege. When the two females were desired to make the search, were they not to be told for what they were to look? The question was clearly for the jury.

1840.

PADMORE
against
LAWRENCE.

Rule absolute (a).

(a) See *James v. Phelps*, post, January 23d.

RAMSEY against NORNABELL.

REPLEVIN for cattle &c. of plaintiff, taken on his land at the parish of *Mårfleet*, in the county of *York*.

Cognizance by defendant as bailiff of the commis-

Replevin.
Cognizance
that the owners
and occupiers
of lands within
the lordship of
M. had im-
memorially re-

paired a jetty, which defended the sea coast, in the lordship and parish of *M.*; that, the jetty being out of repair, a court of sewers was holden and a jury impanelled, who presented, finding the prescription as above, and that the owners and occupiers ought forthwith to repair. That notice was given to the owners and occupiers to appear at the next court, to plead to the inquisition; that they appeared by *L.*, and pleaded Not guilty. That the traverse was tried, and the owners and occupiers found guilty by a jury, who amerced them in 200*l.*, which the commissioners confirmed, and set the amercement on them, and respited the levying thereof, of which they had notice. That, at an adjourned court, it was ordered that, unless the owners and occupiers repaired within fourteen days, the 200*l.* should be levied. That, at a subsequent court, the repairs not being proceeded with, *N.* was appointed to demand and receive the amercement, and afterwards did demand it, but the owners and occupiers refused to pay. That, at an adjourned court, the clerk was ordered to give notice that, unless the amercement were paid before a day named, a warrant would be issued to levy it by distress and sale; that such notice was given, but the owners and occupiers did not pay. That, at a subsequent court, a warrant was made by six commissioners, directing persons therein mentioned to levy the 200*l.* by distress and sale of the goods, &c., of the owners and occupiers; that plaintiff, at the time of the presentment, and thence to the time when &c., was an owner and occupier; that defendant by virtue of the warrant demanded the 200*l.* of him, and, on his refusal, the jetty being still unrepaired, defendant, as a constable mentioned in the warrant, and bailiff of the commissioners, well acknowledged &c.

Held, a good cognizance. For that,

1. The amercement might be on the owners and occupiers of the lordship generally, yet the levy on the individual.

2. That, whether a sale was justifiable or not, the cognizance was good, because it did not shew that a sale had been made in fact, though directed by the warrant.

sioners

1840.

RAMSEY
against
NORHAMPTON

sioners of sewers for the east parts of the East Riding. The cognizance set forth a commission of sewers, issued 11th *August*, 1 *W.* 4., for the said east parts, comprising, among other districts, the three divisions of *Holderness*. It then stated that, from time whereof &c., there of right hath been, and is, and still of right ought to be, within the lordship and parish of *Marfleet* in the county &c., within the division of *Middle Holderness*, being one of the three divisions of *Holderness*, within the limits of the said east parts &c., and within the jurisdiction of the said commissioners, a certain jetty adjoining to, and running into, the river *Humber*, the same jetty during all the time aforesaid being a defence by the coast of the sea there: and that the owners and occupiers of lands within the said lordship of *Marfleet*, from time whereof &c., have repaired and amended, and have been used and accustomed &c., and of right ought to have &c., and still of right ought to repair and amend the said jetty, when and as often as it hath been or shall be necessary, at their own costs and charges. That the commissioners having taken the proper oath &c., and the said jetty before and at the time hereinafter next mentioned being ruinous &c. for want of needful reparation &c., and then and still being within the jurisdiction &c., divers, to wit six, of the commissioners, to wit &c., afterwards and before the time when &c., to wit on &c., by their certain warrant &c.: the cognizance then stated a warrant issued by them to the sheriff of *Yorkshire* to impanel, summon, and return a jury to appear before the six commissioners named, or such other commissioners as should be present, at a session of sewers to be holden at &c., to take inquisition, and to make and return presentments &c.: that due notice was
given

given of the time and place of taking such inquisition, more than seven days before taking the same (stating the manner of publishing notice), according to the statute (a) &c.: and that afterwards, and after the expiration of more than seven days &c., to wit on &c., a court of sewers for the said east parts &c. was duly holden by adjournment at &c., pursuant to the notice, before seven of the commissioners (naming them) &c.

1840.

 RAMSEY
 against
 NORMARELL.

The cognizance then stated that, at the court so holden, the jury appeared, and the jurors (naming them) were sworn and charged &c., and proceeded in their inquiry &c., and did present to the said court &c. Presentment, that, from time whereof &c., there of right had been, and was, and still of right ought to be, within &c., the said jetty adjoining to &c., and that the same was a defence &c. (as before); and that the owners and occupiers of lands within the said lordship had, from time whereof &c. until the time of the taking of that inquisition, repaired &c. (as before): and that the said jetty, on &c., and continually afterwards until the day of the taking of that inquisition had been, and then was, ruinous &c., for want &c., by means whereof it was deteriorated as a defence by the coast of the sea: and that the owners and occupiers of lands within the lordship aforesaid, by reason of the premises, ought, at their own costs and charges, forthwith to repair and amend and make good the said jetty.

The cognizance then stated that the court was adjourned till *February* 18th, 1836; and "thereupon notice was duly given by the clerk to the said court to the owners and occupiers of lands within the said lordship

(a) Stat. 3 & 4 W. 4. c. 22. s. 11., directs the mode of proceeding to inquire by jury.

1840.

RAMSEY
against
NORWANKILL

of *Marfleet* to appear at the next court of sewers to be holden in and for the said east parts" &c., on &c., and to plead to the said inquisition or presentment.

The cognizance went on to state the holding of the court by adjournment on *February* 18th at &c., before &c.; at which court came one *William Longman*, then being "the constable of *Marfleet* aforesaid," and, being then and there duly authorised in that behalf, then and there, for and on behalf of the owners and occupiers of lands within the lordship of *Marfleet* aforesaid, pleaded to the said presentment or inquisition, that the said owners and occupiers were not guilty of the premises &c., and prayed that that might be inquired of by the country; and the clerk of the said court did the like. Adjournment of the court to *April* 7th, for trying the traverse; whereof the owners and occupiers of lands within the lordship of *Marfleet* aforesaid then and there had notice. The cognizance then stated the holding of the court by adjournment on 7th *April* at &c., before &c.; at which court came a jury of sewers duly impanelled, summoned, and returned by the sheriff of the county of *York*, according to the law of sewers in that behalf, and, the said owners and occupiers being present at the same court, the jurors of the said last-mentioned jury, to wit &c., twelve substantial and indifferent persons &c., were sworn to try the issue, and further to do and inquire according to the laws of sewers in that behalf, and were charged by the commissioners touching the premises; and they, upon their said oath, and upon the evidence of witnesses then and there delivered upon oath in the presence of the said court, according to the laws of sewers in that behalf, did then and there find and say that the said owners and occupiers

occupiers &c. were guilty &c. in manner and form &c. "And the jurors aforesaid, upon their oath aforesaid, did then and there, for the said default, amerce the said owners and occupiers of land within the lordship of *Marfleet* aforesaid in the sum of 200*l.* of lawful money of *Great Britain*, which said finding and amerciamment the said last-mentioned commissioners, at the court last aforesaid, did then and there confirm, and did then and there set and impose the said amerciamment on the said owners and occupiers, and did then and there respite the levying of the said amerciamment: of all which premises (notice to the owners &c. at the same court): and the court was thereupon duly adjourned.

That, the jetty remaining unrepaired, afterwards, to wit on &c., a court of sewers for the said east parts was holden on &c., at &c., before &c.; and it was ordered by the said court that, unless the owners &c. should, within fourteen days, proceed effectually with the repairs, the said sum of 200*l.* should be levied at the expiration of that period; of all which the owners &c. had due notice. That, the owners &c. not having proceeded with such repairs, afterwards, to wit on &c., at &c., before &c., an adjourned court was holden, and one *John Nutchey* appointed by order of such court to demand and receive the said amerciamment; and the court was adjourned to *November 5th, 1836*. That *J. N.* afterwards duly demanded the amerciamment, but the owners &c. neglected and refused to pay. That, the 200*l.* being unpaid, and the jetty not repaired, at a court holden by adjournment on *November 5th, 1836*, at &c., before &c., it was ordered that the clerk of the court should give notice that, unless the said amerciamment of 200*l.* was paid to *J. N.* before *November 19th, 1836*, a warrant

1840.

 RAMSEY
 against
 NORNABELL.

1840.

RAMSEY
against
NORRELL

for levying the same by distress and sale would be issued at the next court, to be then held, and the amercement levied. That the court was adjourned to *November* 19th, and due notice of the said order given before that day by the clerk of the last-mentioned court to the owners, &c., and they were then required by the said clerk to pay the said *J. N.* the said 200*l.* pursuant to the order.

That, default being made in payment, and the jetty unrepaired, afterwards, to wit on 19th *November*, a court was holden by adjournment at &c., before seven of the commissioners, to wit &c., and it was there ordered by the same court that the 200*l.* should be immediately levied by distress and sale, and a warrant for that purpose be signed by six of the last-mentioned commissioners: and thereupon at that court, to wit on &c., six of the last-mentioned commissioners, to wit &c., made their warrant (a) in writing under their respective hands and seals, and directed the same to *William Burrill*, then being bailiff of sewers to the said commissioners, and to all constables and other peace officers, and thereby, after reciting that, at the session and court of sewers, holden &c. on the 7th day of *April* then last, the owners and occupiers of lands within the lordship of *Marfleet* in the parts aforesaid were amerced in the said sum of 200*l.*, which sum it had been that day proved to them the said last-mentioned commissioners, by the oath of the said *John Nutchey*, duly appointed to receive the same amercement, that the said owners and occupiers had neglected or omitted to pay, when demanded of them, the said

(a) See stat. 3 & 4 W. 4. c. 22. s. 53.

last-mentioned commissioners did thereby therefore authorise and command the said persons to whom the said warrant was so directed as aforesaid, any or either of them, to levy the said 200*l.* by distress and sale of the goods and chattels of the said owners and occupiers, together with the costs and charges of such distress and sale, rendering the overplus, if any, to the said owners and occupiers; which warrant afterwards, and before the time when &c., to wit on &c., was delivered by the said last-mentioned commissioners to defendant, who then was, and from thence hitherto hath been, and still is, chief constable of the division of *Middle Holderness* &c., to be executed in due form of law.

That the lands &c. in the declaration mentioned, and in which &c., are, and from time whereof &c. have been, situate within the said lordship of *Marfleet*, and the owners and occupiers thereof during all the time last aforesaid were and are liable to the repairs of the said jetty as aforesaid. That plaintiff, at the time the presentment or inquisition aforesaid was so made and found as aforesaid, and from thence until and at the said time when &c., was owner and occupier of the said lands in which &c., the same being also within the division of *Middle Holderness* aforesaid, in the east parts &c. aforesaid; and that defendant, just before the said time when &c., by virtue of the said warrant, having demanded payment of the plaintiff of the said 200*l.* in the said warrant mentioned, but the plaintiff then refusing to pay the same or any part thereof, and the said jetty then and still being wholly unrepaired, he the defendant, as such constable as aforesaid, and as bailiff of the said commissioners, well acknow-

1840.

 RAMSAY
 against
 NORMANELL.

1840.

RAMSEY
against
NORNABELL.

ledges the taking &c., as for and in the name of a distress for the said sum of 200*l.* in the said warrant mentioned &c. so being in arrear &c. Verification.

Pleas in bar. 1. Admitting the commission, holding of the courts, presentment, verdict and amercement, orders of the court of sewers, and issuing of the warrant; that defendant, of his own wrong, and without the residue of the cause &c., took &c. Conclusion to the country. 2. That the jetty was not nor is a defence of the coast of the sea, in manner &c. Conclusion to the country. 3. That, before the issuing of the commission, viz. in 1800, the jetty ceased to be, and became and was and from thence hitherto hath been and still is no longer of any use as a defence by the coast of the sea within the said lordship, parish, or division. Verification. 4. That the owners and occupiers of lands within the said lordship, at the time of the issuing of the said commission, or since, ought not of right to have repaired &c., nor still of right ought &c., when and so often &c., in manner &c. Conclusion to the country, 5. This plea led to an issue of fact. 6. That the owners and occupiers of the lands in the declaration mentioned, and in which &c., were not, from time whereof &c., liable to the repairs &c. Conclusion to the country. 7. That, at the time of the verdict and amercement and confirmation thereof by the commissioners, divers other persons besides plaintiff, to wit (naming them) respectively, were owners and occupiers of divers lands within the lordship, and as such were liable and of right ought to have, together with plaintiff, repaired the said jetty, and were guilty of the premises in the said presentment or inquisition mentioned, and were living at
the

the time of the distress, and then respectively had cattle and goods within the lordship. Verification.

Demurrer to all the pleas but the fifth, assigning, among others, the grounds hereinafter stated in the argument for the defendant. The plaintiff stated, as his points for argument: That the cognizance is bad, and that the general finding and amerciamment by the jury, as stated in it, is invalid in point of law; that a general order and amerciamment upon a district or body of persons was illegal; that a general warrant to levy the amount of the amerciamment upon the owners and occupiers of lands was illegal; and that the making the distress upon the plaintiff for the amerciamment was illegal. Also that the pleas in bar were good, and the facts thereby denied properly traversable.

The demurrer was argued in *Michaelmas* term, 1839 (a).

Starkie for the defendant. The first plea is bad, because it puts in issue matter of fact and matter of record together in one general traverse; *Crogate's Case* (b). The Court of Commissioners of Sewers is a court of record; *Callis on Sewers*, 163—167., where it is said that writs of error have been brought on the judgments of that Court; *Com. Dig. Sewers* (D). The power to fine shews that they are a court of record. *Groenvelt v. Burwell* (c). The plea is also bad, because it puts matter of record in issue to be tried by the country; *Com. Dig. Record* (B); *Dring v. Respass* (d). The fine here is matter of record, and the ground of it

1840.

RAMSEY
against
NORNABELL.

(a) November 12th. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) 8 Rep. 66 b.

(c) 1 *Ld. Ray.* 454. 467.

(d) 1 *Lev.* 193.

1840.

—
RAMSEY
against
NORMANELL.

cannot be brought in question; *Groenvelt v. Burwell* (a). The distress was in the nature of an execution; in such a case replevin does not lie; *Callis*, 200. A matter once determined by a competent jurisdiction cannot be brought into controversy again by action of replevin or trespass: this has been decided several times in cases of conviction by justices: *Rex v. Monkhouse* (b), *Wilson v. Weller* (c), *Brittain v. Kinnaid* (d), *Fawcett v. Fowles* (e). And, further, where the Court has jurisdiction, no action lies against the officer or minister executing its process, though the judgment of the Court may have been erroneous; *Case of the Marshalsea* (g). *Garnett v. Ferrand* (h) also supports this proposition. The second, third, fourth, and sixth pleas are also bad, as bringing into dispute matters already decided by a court of competent jurisdiction.

The question raised by the seventh plea is, whether the amerciamento was properly laid, and ordered to be levied, upon the owners and occupiers generally, or whether, as the plaintiff will argue, individual proprietors ought to have been charged "after the quantity of their lands, tenements, and rents." The latter proposition confounds the authority to punish with the authority to tax, which is a distinct, and, as stat. 23 H. 8. c. 5. s. 3. gives it, a new power. By the commission of sewers, the commissioners are to inquire through whose default hurts and damages have happened, and who hath or holdeth any lands or tenements &c., or hath or may have any hurt, loss, or disadvantage by any manner of means in the said places &c., "and

(a) 1 Ld. Rep. 454. 470.

(c) 1 Brod. & B. 57.

(e) 7 B. & C. 394.

(h) 6 B. & C. 611.

(b) 2 Stra. 1154.

(d) 1 Brod. & B. 432.

(g) 10 Rep. 68 & 76 a.

all those persons, and every of them, to tax, assess, charge, distrain, and punish, as well within the metes, limits, and bounds of old time accustomed, or otherwise, or elsewhere within our realm of *England*, after the quantity of their lands, tenements," &c. The words must be taken reddendo singula singulis; the commissioners are to tax those who will benefit by the works, and punish those whose default has occasioned injury. It cannot be meant that they shall "punish" the persons guilty of nuisances "after the quantity of their lands." Nuisances may be caused by those who have no lands. A general assessment is to be proportioned according to justice; but a person liable ratione tenuræ to repair, and making default, must be fined in the necessary amount, whether he have more or less land. *Emmerson v. Saltmarshe* (a) may be cited for the plaintiff: there an assessment in gross upon a township was held bad; but the Court, in its judgment, expressly took the distinction now relied upon between assessments and amercements, and the grounds of decision apply only to assessments: so also do *Rooke's Case* (b), *The Case of the Isle of Ely* (c), and *Helley v. Boyer* (d); for, although in this last case it is stated that a "fine" was "assessed" upon the village of D. and appointed to be levied on *Helley's* cattle, it appears from the judgment of the Court that their opinion, as to the propriety of assessing generally, related to a taxation, not an amercement. The case is most fully stated in 2 *Bulst.*, where the language of *Coke C. J.* and *Doderidge J.* (e) bears strongly on the point now in dis-

1840.

 RAMSEY
 against
 NORMANELL.
(a) 7 *A. & E.* 266.(b) 5 *Rep.* 99 b.(c) 10 *Rep.* 141 a.(d) *Cro. Jac.* 336. *S. C.* 2 *Bulst.* 197.(e) 2 *Bulst.* 198, 199.

1840.

RAMSEY
against
NORMANELL.

cussion. *Custodes, &c. v. The Inhabitants of Outwell (a)*, where it was held that an apportionment ought to be made, was a case of taxation. The authorities cited in *Com. Dig. Sewers* (E 2.), as to apportioning, relate to assessments. The commissioners of sewers, acting under the commission given them by stat. 23 H. 8. c. 5. s. 3., "to hear and determine" all the matters there set forth, may proceed as courts of the like jurisdiction do in criminal cases; and, where a district is found guilty before them, the execution must conform to the judgment; *Com. Dig. Execution*, (I 3.). They clearly have power, not merely to enforce repair, but to punish for nuisance; *Rex v. Hide (b)*, *Callis*, 255—270. And it is shewn in *Callis's* second lecture, 122—126., that, if a township be amerced, of which practice he cites several instances, and execution be levied on one man's goods, the rest may be subjected to contribution. A similar proceeding takes place where judgment is given against the hundred; the levy is to be made upon the inhabitants; but any one or two may be levied upon, and obtain contribution afterwards. It was not, however, till the passing of stat. 27 Eliz. c. 13. (sects. 4, 5), that the individuals had this relief. So, in the case of highways, the fine upon inhabitants for non-repair may be levied on individuals, and, before stat. 13 G. 3. c. 78. (s. 47.), they had no power of enforcing contribution. So also it must have been in cases now within the Statute of Sewers; before that act gave the power of laying a proportional assessment, the inhabitants of a district would be charged with non-repair; on conviction they would be amerced; and the fine would be levied on particular

(a) *Style*, 178. 184.(b) *Style*, 60.

inhabitants.

inhabitants. The law continues the same as to levying fines and amerciaments imposed by the commissioners of sewers, but they are no longer returned into the exchequer as formerly, stat. 3 & 4 *W. 4. c. 22. s. 53.* directing that they shall be demanded and received by the officer of the commissioners, and levied, in case of non-payment, by distress and sale under their warrant, and by them applied to the same purposes as the monies raised, levied, or set apart by them for defraying and reimbursing the general expenses of executing the commission of sewers under which they act.

1840.

RAMSEY
against
NORRELL.

Wightman, contra. It seems that *Callis* inclined to consider the court of the commissioners to be a court of record, though he states difficulties on this point. But, assuming that to be so, the case must appear to be within the jurisdiction of the Court in order to raise a defence. Now the cognizance shews nothing on which this warrant can be founded. The notices are stated to have been given to the owners and occupiers generally; but it should appear that they were given to the plaintiff individually. This is not averred in the cognizance; for, if issue were joined on the fact of notice there averred, the averment would be proved by shewing notice given to owners and occupiers not including the plaintiff. No averment that the plaintiff was owner or occupier occurs before the end of the cognisance. The warrant directs that the amercement of 200*l.* shall be levied by distress and sale. But this is illegal, as the law stood before, and as it is since, stat. 3 & 4 *W. 4. c. 22. s. 53.* First, as to the older law. The power of the commissioners to levy a fine is denied in *Callis*, p. 176., where he says that "they have no power to levy but

1840.
 ———
 RAMSEY
 against
 NORMANELL.

but to estreat the fines into the king's exchequer." For an amercement they may distrain, *Callis*, p. 179, &c.: and *Callis*, p. 188, &c., argues that the distress may be sold: but his reasoning, and the authorities cited by him, do not satisfactorily support his conclusion: and he treats the question as a tender one. Many statutes expressly authorise the sale of distresses; and this shews that there can be no general principle supporting such sales. And so stat. 3 & 4 W. 4. c. 22. s. 53. amounts to a legislative declaration on this very question, and shews that at common law the distress could not be sold. At all events, the distress upon the individual here, and the subsequent sale, cannot be supported: the parties complained of and amerced are the owners generally: the amercement, according to the words of the commission relied upon on the other side, is by way of punishment. The individual is not to suffer the aggregate punishment inflicted on all the owners and occupiers. The decisions on this point are contradictory. *Callis* appears, p. 123, to have considered that a whole township could be assessed for repairs: it is now decided that the law is otherwise, *Emmerson v. Saltmarshe* (a): and that case is a conclusive authority for the plaintiff here, unless the distinction can be supported between an assessment and an amercement. Now the words of the statute and commission apply equally in each case. *Callis* seems not to have sufficiently directed his attention to these words when he holds that the assessment or amercement may be laid on the township, and an individual distrained upon for the whole; and great inconvenience would result from adopting his doctrine, as the

(a) 7 A. & E. 266.

whole assessment or amercement might fall on a party who possessed but a minute portion of the land liable. *Callis* defends the doctrine, by arguing that the party upon whom the distress is levied may ascertain the quantities of the estates of the other townsmen, and procure a due proportion of the rate to be imposed on each by the commissioners; but the commission in the statute directs the commissioners to make the enquiry in the first instance, so that the inconvenience ought never to arise. [*Patteson J.* Who are "all those persons" who are to be taxed, assessed, charged, distrained, and punished? If the words refer to what precedes, and include those by whose default the damages have happened, and those who may have "hurt, loss, or disadvantage," it seems strange to punish a man because he may suffer loss. Perhaps the words may be taken distributively, so that the punishment may be applied to the defaulters, and the distress to those who are likely to suffer damage (a). *Coleridge J.* What do you say should be done upon a verdict of Guilty being given?] The commission should be pursued in the presentment: it should set forth the proportions of estate, naming the owners and occupiers. Suppose all that any one owner or occupier was bound to perform, as his share, was insufficient: he might have done his part, and yet be liable, on the verdict of Guilty against the owners and occupiers, if the doctrine contended for on the other side be correct. [*Coleridge J.* It is no defence for a

1840.

 RAMSEY;
 against
 NORNABELL.

(a) A subsequent part of the commission directs the commissioners "to distrain for the arrearages of every such collection, tax, and assess, as often as shall be expedient, or otherwise punish the debtors and detainers of the same, by fines, amerciaments, pains, or other like means after your good discretions."

joint

1840.

RAMSEY
against
NORRELL.

joint obligor that he has paid his share.] The law of sewers is otherwise: the parties are to contribute according to their estates. [*Coleridge J.* On an indictment against a township, any individual may suffer in the same way.] The principles of that branch of the law are foreign to the law of sewers. [*Coleridge J.* Supposing you are right as to the liabilities of owners and occupiers inter se, will the same reasoning apply as against the commissioners?] It will so; because the commissioners are ordered in the first instance to ascertain the quantities of estate. [*Coleridge J.* Suppose one or more of the owners or occupiers to be unable to contribute: according to your doctrine, there will be this inconvenience, that a certain part will be unpaid.] That might have been urged in *Enmerson v. Saltmarshe* (a). It is not said on whom *Nutchey* made the demand; but a refusal by "the said owners and occupiers" is alleged, which does not shew a refusal by the plaintiff individually. *Hetley v. Boyer* (b) proves that a fine imposed by the commissioners on a vill cannot be levied by distress on an individual.

Then, as to stat. 3 & 4 W. 4. c. 22. s. 53.; it authorises only "distress and sale of the goods and chattels of the person, body politic or corporate, upon whom such fines, amerciaments, penalties, or forfeitures shall or may be set or imposed." Here the amercement is set or imposed on the owners and occupiers generally; but the distress and sale is of the goods of the individual. And in the form in sect. 54 it is averred

(a) 7 A. & E. 266.

(b) Cro. Jac. 336. S. C. 2 Bulst. 197.

that

that *A. B.* was fined &c. and neglected to pay, he being, as appears from the form, the party on whom the distress is to be levied. [Lord *Denman* C. J. *Longman*, who is averred to have appeared for the owners and occupiers, "within the lordship of *Marfleet*," is only stated to have been constable "of *Marfleet*."]

1840.

RAMSEY
against
NORRELL.

Starkie, in reply. The difficulty last suggested does not arise on the pleadings, as the owners and occupiers might authorise any one to appear, and it is averred that *Longman* did appear for them. As to the power of sale, stat. 3 & 4 *W.* 4. c. 22. s. 53. is conclusive. It may, however, be doubtful whether there might not, before that act, have been a sale under a *levari facias*, without going to the Exchequer. There are instances of this power being given by statute, as in the Highway Act, stat. 13 *G.* 3. c. 78. s. 47. At any rate, as the goods here are replevied before sale, the objection does not arise. In note (a) to *Callis*, 126. (4th ed.) it is said that, if the plaintiff be aggrieved, "he may have relief by suit in the Exchequer." The same difficulty would apply to distresses upon hundreds or townships; and it could not have been done away with by estreating into the Exchequer. The hardship is not great, inasmuch as parties take the land subject to the burthen. It is not to be assumed that the power arises from the commission only; and, even if it does, the words referred to may be taken distributively, and more general powers, to make statutes, &c., and hear and determine, are given in subsequent clauses. A party may be guilty of default, though he has no lands liable to injury, if he hold lands which are given on the condition

1840.
 ———
 RAMSEY
 against
 NORMANELL.

dition of repairing. The presentment is good without naming the parties liable; 2 *Hawk. P. C.* 222. (a) B. 1. c. 76. s. 246. (xviii.), where 2 *Roll. Abr.* 79. *Indictment*, (L), pl. 1. is cited. The offence here charged was punishable before stat. 23 *H. 8. c. 5.* Suppose an owner who has land subject to these repairs conveys it away in small parcels to different parties, it is clear that no one parcel can be exempt from any part of the liability which was originally incumbent on all.

Cur. adv. vult.

Lord DENMAN C. J. in this term (*January 22d*), delivered the judgment of the Court.

This was an action of replevin. Cognizance was made under the commissioners of sewers for the east parts of the *East Riding of Yorkshire*, as a distress for an amercement on the inhabitants of the township of *Marfleet*, who had been presented as liable by custom to the repair of a certain jetty, had pleaded Not guilty, and been found, on trial, guilty, whereupon the Court had amerced them in 200*l.*, and directed their warrant under seal to defendant to levy the same on plaintiff's farm and lands, being within the township.

There were several pleas in bar, and demurrers thereto; but, on the argument, the plaintiff relied wholly on the insufficiency of the cognizance.

Some objections to the notice and demand were but little pressed, the points raised being, 1. That the commissioners have no right to amerce a whole township in one sum. 2. That, even if they had a right to distrain, it could only be for safe custody, till amercement paid,

(a) 7th (*Leach's*) ed.

and

and the right to sell did not follow. But this point does not arise, no sale, nor any thing beyond the detention, being stated in the declaration or cognizance.

On the point, whether commissioners have power to amerce a township for neglect to repair works which they by custom are bound to repair, we have no doubt they may. That they cannot assess or tax a township in respect of benefit received from drainage, is clear from established authorities, and was lately declared by this Court in *Emmerson v. Saltmarshe* (a). Herein we disregarded the doubt cast by *Callis* on *The Case of the Isle of Ely* (b), where that doctrine is laid down. He says (p. 128.), "I do remember, that at the assizes held at Lincoln in anno 12 Jacobi, in a trial before Sir Edward Coke then Judge of assize, in the case of Sir Philip Conisby Knight, the town of Mauton was assessed 5*l.*, and Tringmore as much, and a distress was taken for non-payment thereof, and was justified in a replevin, and the verdict passed for the distrainer, and no great scruple was then made of the said assess laid and imposed generally upon the towns; which case I specially noted, because it was tried and passed for current before the said Sir Edward Coke, who had the year before reported the law in his tenth Report to the contrary."

But Serjeant *Callis* did not advert to the distinction between a tax and a fine. He states, in page 126, that "in Doctor and Student a whole town was amerced, and they met together by common consent, and assessed and rated every man equally according to his ability, and allowed of as a good cause." This was an amerce-

1840.

 RAMSEY
 against
 NORNABELL.

(a) 7 A. & E. 266.

(b) 10 Rep. 141 a.

1840.
—
RAMSEY
against
NORNABELL.

ment of the township, and a rate among themselves to raise the money. *Helley v. Boyer* (a) is said in the report to have been a *fine* ; but, on more accurate examination, it was a tax or assessment, and so illegal, on the principle laid down in that case, as well as in the *Case of the Isle of Ely* (b), that every occupier and owner shall be charged to the extent of benefit received from the sewer. This does not affect the right to amerce a township liable by custom, which is precisely in the position of a township liable for the repair of a road, when, if found guilty, the fine is imposed on all, however they may make an equitable distribution among the inhabitants afterwards.

Judgment for the defendant.

(a) *Cro. Jac.* 336.

(b) 10 *Rep.* 141 a.

1840.

FRYER *against* COOMBS.

DEBT for rent by assignee of the reversion against assignee of a term. The declaration stated that one *Jeremiah Cray* at the time of making his will until his death was seised in his demesne as of fee of and in certain tenements thereafter mentioned to have been demised to *J. Ball*; that, being so seised, he devised them by his will to his wife *Sarah Cray* for the term of her life, and "after her death to Sir *Thomas Broughton* and *Christopher Taylor* upon the trusts therein mentioned," with power to and for the said *S. Cray* during her life, and after her decease "to and for the said Sir *T. Broughton* and *C. Taylor* and the survivor of them, his heirs, executors, and administrators," to lease by indenture for one, two, or three lives, or for years determinable on one, two, or three lives, the premises which had been usually leased; so as there should be no more than three lives in being together at the same time, and so as upon every such lease the usual and accustomed rent should be reserved or made payable yearly during the term; and so as such lease should not be without impeachment of waste, and the lessee should execute a counterpart thereof. Averment of the death of *J. Cray* while so seised without altering his will, whereby *Sarah Cray* became seised in her demesne as of freehold for her life; and that being so seised she, by indenture

A declaration in debt by assignee of the reversion against assignee of the lessee for rent, in which it appears that the reversion was conveyed to plaintiff for his life if *A.* and *B.* should so long live, must aver the continuance of the lives of *A.* and *B.*; and the want of such averment is not cured, on general demurrer, by a statement in the breach, that the rent "accrued due after the plaintiff became so seised as aforesaid" of the reversion, and "became and was due and still is in arrear to the plaintiff."

Seemle, when a leasing power requires that the lessee shall execute a counterpart, it is not necessary that the execution of the lease and of

the counterpart should be contemporaneous.

A power to lease, so as the usual rent be reserved or made payable yearly, is well executed by a lease reserving the usual yearly rent, but making it payable half-yearly.

1840.

 FRYER
 against
 COOKER.

(profert of a counterpart, sealed by the said *J. Ball*, and dated the same day as the indenture of demise) demised to *J. Ball* "certain pieces or parcels of ground particularly mentioned and described in the said indenture" (except as therein excepted) for ninety-nine years if three persons therein named should so long live, paying yearly to the said *S. Cray*, her executors, &c., the rent of 6*l.* per annum during the said term at *Ladyday* and *Michaelmas*. Covenant by the said *J. Ball* with the said *S. Cray*, her executors, administrators, and assigns, to pay the rent to her, her executors, &c. Averment, that upon such demise the usual and accustomed yearly rent, and more, was reserved during the continuance of the lease, and that the said lease was not made without impeachment of waste: That the said *S. Cray* afterwards died, whereby the demised premises became vested in Sir *T. Broughton* and *C. Taylor* for the purposes of the said will. That the said Sir *T. Broughton* and *C. Taylor*, and *A. C. Grant*, *L. J. Grant*, and *H. M. Grant*, afterwards conveyed the reversion by lease and release to *William Fryer*, "his heirs and assigns," whereby "the said *William Fryer* became and was, and from thence until his decease continued to be, seised in his demesne as of fee of and in the reversion" of the demised premises; that the said *W. Fryer* devised the same to the plaintiff for his life, who, after the death of the said *W. Fryer*, became "seised in his demesne as of freehold of and in the reversion for the term of his life." Averment that *J. Ball* was still living, and that, during the continuance of the term and after the making of the said indenture, all his estate and interest in the demised premises legally vested in defendant by assignment thereof; and that, during the continuance of the term and after plaintiff became so seised of the reversion of

the

the premises, rent for four years and a half then last past, "all of which accrued due after the plaintiff became so seised as aforesaid, became and was due and still is in arrear and unpaid to the plaintiff," contrary to the tenor and effect of the said indenture and covenant, &c.

1840.

 FRYER
 against
 COOMBS.

Demurrer, assigning for causes that it did not appear with sufficient certainty that the premises demised to *J. Ball* were the premises devised to *Sarah Craig*; or that she demised to *J. Ball* the premises devised to her by *J. Cray*; or that the premises had been usually leased; or that *S. Cray* had power to demise them for a period exceeding her life; or that the term did not cease at her death, although the plaintiff did not claim under her; or that *J. Ball* executed any counterpart; also that plaintiff had declared on a covenant to pay rent to *S. Cray*, her executors, administrators, and assigns, without shewing any title under, or as representing, her, but claiming independently of her and of her estate and interest in the premises, &c. Joinder.

At the sittings in banc in last *Trinity* vacation (a), the demurrer was argued by

Martin, for the defendant, and *Barstow*, for the plaintiff. Upon the argument it was assumed (b) that *J. Cray* had devised to Sir *T. Broughton* and *C. Taylor* an estate in fee simple in the demised premises; and the principal questions were, whether the power to lease appeared by the declaration to have been duly exercised by *Sarah Cray*, and whether, supposing the power not to have been strictly pursued, the defendant could be admitted to object to the validity of the lease where the assignee of the remaindermen had adopted it by suing for the reserved rent.

(a) *June 21st*, 1839.

(b) In consequence of an error in some of the paper books.

1840.

FRYER
against
COOMBS.

For the defendant it was contended, 1. that the premises did not appear to have been "usually leased;" 2. that the rent had been reserved half-yearly, instead of being "reserved or made *payable yearly*," as the power required; 3. that the contemporaneous execution of a counterpart by the lessee was a condition which did not appear to have been complied with; for, though profert was made of a counterpart, it did not appear when it had been executed; and that, if the power was ill executed, then there was no deduction of title from the original lessor to the plaintiff, nor any privity between the plaintiff and defendant.

For the plaintiff it was argued that the invalidity of the lease could not be taken advantage of as between the plaintiff and defendant; but that, if it could, the lease was valid, for that, as to the first objection, it was evident that the premises had been usually demised, because the rent was averred to be the "usual and accustomed" rent. As to the second objection, *Doe dem. Earl of Shrewsbury v. Wilson (a)* was relied on, where the same objection was overruled. As to the third, the counterpart was actually produced, and might have been denied by a plea of non est factum; and there was nothing to shew that it ought to have been executed concurrently with the lease.

Per curiam (b). None of the objections urged against the lease are tenable. *Doe dem. Earl of Shrewsbury v. Wilson (a)* is in point as to the reservation of rent. As to the counterpart, the execution of it need not be contemporaneous with the lease; besides, it appears to have

(a) 5 B. & Ald. 363. See also *Threadneedle v. Linum*, 1 Freem. K.B. & C.P. 180. *Doe dem. Douglas v. Lock*, 2 A. & E. 705.

(b) Lord Denman C. J., Patterson and Williams Js.



borne the same date as the demise, and may therefore be taken to have been contemporaneous. It is unnecessary to enter upon the more general grounds urged in support of the declaration.

1840.

FRYER
against
COOMBS.

Judgment for the plaintiff.

After the opinion of the Court had been given upon the above argument, it was agreed by the counsel on both sides that another point had been omitted in argument in consequence of the mistake into which they had both been led as to the words of the declaration; and it was further agreed that the case should be heard before a single Judge at chambers. The case was accordingly argued at chambers by the same counsel before *Patteson J.*, who now (11th *January*), in open court, delivered the following judgment.

PATTESON J. Upon the hearing before me the point appeared to be this. [His lordship here stated the substance of the declaration, as above.] The objection to this declaration is, that there is no averment that either *Sir Thomas Broughton* or *Christopher Taylor* was living when the rent accrued due. The objection arises on general demurrer; for, though special causes of demurrer are assigned, I am clearly of opinion that they do not point to this objection.

No doubt such an averment is necessary; for by the will, as stated in the declaration, *Sir T. Broughton* and *Christopher Taylor* took an estate for life only, for want of words of inheritance (which estate was not enlarged by the subsequent words used in creating the power); and they conveyed nothing more to *William Fryer* than an estate for their lives; and the plaintiff could take

1840.

 FRYER
 against
 COOMBS.

nothing more by *William Fryer's* will. The declaration does not set out the trusts of *Jeremiah Cray's* will, nor any devise subsequent to that of *Sir T. Broughton* and *C. Taylor*. The Court therefore cannot tell why the *Grants* joined in the conveyance to *W. Fryer*, nor whether their so joining had any and, if any, what effect. The averment, that *W. Fryer* was seised in fee, is contradictory to the facts and documents stated; and it is plain that the plaintiff was seised of the reversion for his own life, if *Sir T. B.* and *C. T.* should so long live, and no longer. The case of *Thursby v. Plant (a)*, and the cases cited in the note there, shew beyond a doubt that the continuance of the lives of cestuis que vie ought in such a case to be averred.

But it is argued that such continuance is impliedly averred by the words of the breach, viz., that the rent, "all of which accrued due after the plaintiff became so seised as aforesaid, became and *was due, and still is in arrear, to the said plaintiff*," because, unless the lives continued it could not be due to the *plaintiff*. If this argument be good, *all* statement of the mode by which the reversion passed to the plaintiff might equally be omitted; whereas it has long been established beyond dispute that the derivative title of the plaintiff must be traced. The only colour for this argument arises from three cases cited in the note to *Thursby v. Plant (a)* above referred to; but on examination they do not sustain it.

The first case is *Anonymous* in *Dyer's* reports (*b*). There the plaintiff, who claimed under a rector, averred that the rector was and *yet is* seised: Doubtless that

(a) 1 *Wms. Saund.* 235. note (8).

(b) *Dyer*, 304 a. pl. 52. See also *Scamler v. Johnson*, *Sir T. Jones*, 927. averment

avermment implied that the rector was living at the time of the declaration.

The second case is *Anonymous* (a) in *Brownlow*, and *Tompson v. Withers* (b) evidently the same case on error. It was an action on the case for a nuisance in building too near the plaintiff's house. The declaration stated a demise to plaintiff for years, if the lessor should so long live, "by virtue of which the plaintiff hath been and *still is possessed*," without averring the life of the lessor. The Courts held that there was a sufficient averment by implication of the life of the lessor, who must of necessity be living, otherwise the plaintiff could not be possessed. The declaration is not given at length in either of the reports, which are very short; nor does it appear to have been discussed whether possession alone was not enough to sustain the action without shewing title, as doubtless would be now held. Probably the averment was taken strictly as meaning that the plaintiff still was possessed *by virtue of the lease*, and, if so, it necessarily implied the continuance of the lease, *i. e.* the life of the lessor. And, if the present declaration had not only averred that the plaintiff became seised of the reversion for life, but had added "and still is," it would have been difficult to distinguish the cases; but those words are wanting in the present case.

The third case is *Harlow v. Bradnox* (c), in which the defendant made cognizance for rent as bailiff of husband and wife. At that time it was necessary to set out the title of the landlord; and of course it appeared by the record that the wife was entitled to the rent for life. It must then have averred that the rent was due and in

(a) 1 *Brownl. & G.* 4.

(b) 2 *Bulstr.* 263.

(c) 2 *Lev.* 88.

1840.

 FRYER
 against
 COOMBS.

1840.

FRYER
against
COOMBS.

arrear to her, or to her husband in her right, and that the defendant as bailiff to the husband and wife distrained. On special demurrer alleging for cause that the wife was not averred to be living, the Court held that the words "being in arrear" were quasi an averment of the wife's life, and good enough. Perhaps it may be doubted whether the report accurately shews the ground of the decision; but it is obvious that, as a person cannot be bailiff to one who is dead, the making cognizance as bailiff to *A.* necessarily implies that *A.* was alive when the distress was made (*a*). It is as much implied as the life of a party to the record, which is never averred; but the present case regards the life of a third person, not party to the record nor averred to have authorized the act done by the party pleading.

I am therefore of opinion that the cases cited do not govern the present; that the continuance of the life of Sir *T. Broughton* or of *C. Taylor* is not necessarily to be implied; and that the judgment must be for the defendant.

Leave to amend on payment of costs, otherwise

S. Judgment for the defendant.

(*a*) *Harlow v. Bradnox* is also reported in 1 *Freem. K. B. & C. P.* 107. (nom. *Holloway v. ———*), and in 3 *Keb.* 151., 166. In these reports the words *as bailiff of the wife*, &c. seem to have been relied upon as curing the defect; and, according to *Keble*, the parties agreed to amend. See also *Weekes v. Peach*, *Lutw.* 1226. and *Whately v. Conquest*, *Carter*, 217.

1840.

MONKMAN *against* SHEPHERDSON.*Wednesday,
January 15.*

INDEBITATUS debt for 10*l.* for wages of plaintiff for his service as hired servant of defendant.

Plea; that when plaintiff was hired by defendant, it was agreed between them that, in case plaintiff should at any time during his service voluntarily become drunk, he should forfeit all wages then due, and defendant should cease to be liable for the same or any part thereof; that plaintiff served defendant on those terms; that afterwards, and after the money mentioned in the declaration became due, and whilst plaintiff was in the service of defendant and before action brought, plaintiff became and was drunk, whereby he forfeited the wages in the declaration mentioned, and defendant ceased to be liable for the same, or any part thereof. Verification.

Replication; that, after plaintiff so became and was drunk, defendant, well knowing that plaintiff had been drunk, exonerated and discharged him from so being drunk, and from all forfeitures incurred by him and which had accrued to defendant in respect thereof, and then agreed to pay to plaintiff the wages already due to him as such hired servant as aforesaid, and then continued to employ him as such servant as aforesaid. Verification.

Debt for wages as hired servant. Plea, that plaintiff was hired on the terms that, if he should be drunk during service, he should forfeit all wages then due: that after the wages became due and whilst plaintiff was in defendant's service, he was drunk, whereby &c. Replication, that after plaintiff was drunk, defendant exonerated him from the forfeiture, and agreed to pay him the wages already due as aforesaid, and continued to employ him as such servant. New assignment, that part of the wages accrued due before plaintiff was drunk, and the rest afterwards; and that plaintiff declared not only

for wages due before but also for wages due after, &c.

Held, on special demurrer, that the replication was bad for not shewing any consideration for agreeing to pay the forfeited wages. Held also, that the replication and new assignment together were not double, for the plea applied only to wages due before forfeiture, and the new assignment to wages due after.

Where defendant demurs to a replication and new assignment for that "they are not, nor is either of them sufficient in law," and shews for causes that the replication is bad in itself and both together bad for duplicity, the demurrer is divisible, and judgment may be for defendant on the replication and for plaintiff on the new assignment.

New

1840.

—
MONKMAN
against
SHEPHERDSON.

New assignment, alleging that only a part, to wit 3*l*., parcel &c., accrued to plaintiff as wages before he so became drunk, and that the residue, to wit 7*l*., accrued to plaintiff for wages as aforesaid after he so became drunk, and after defendant had notice thereof as aforesaid; and that plaintiff declared not only for wages due before, but also for wages due after, he so became drunk, and after notice thereof to defendant. Verification.

Demurrer, shewing for causes, 1. as to the replication, that it stated no consideration for exonerating plaintiff from the forfeitures &c., or for agreeing to pay the wages; and that it tended to raise an immaterial issue, viz., the continued employment of plaintiff as servant; 2. that the replication and new assignment were double, for that the former, if true, was an answer to the plea, and the latter was also an answer to part of the plea (a). Joinder.

The case was argued at the sittings in banc after *Hilary* term 1839 (b).

Martin for the defendant. The pleadings shew no consideration for the agreement to pay relied upon in the replication. The liability of the defendant was completely discharged by the matters stated in the plea, and cannot be revived without a fresh consideration.

(a) The demurrer included both the replication and the new assignment, alleging that they "were not, nor were either of them, sufficient in law." As the judgment of the Court was for plaintiff as to one, and for defendant as to the other, it seems that the Court did not consider the demurrer objectionable as being too large. The same objection was disregarded in *Vivian v. Jenkin*, 3 *A. & E.* 741., cited in the argument *suprà*. See 1 *Man. & Graing.* 201. note (a) to *Hinde v. Gray*.

(b) *February* 5th, before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* J.

Then

Then the new assignment and replication together are double, for the plea covers the whole declaration and the replication answers the whole plea, yet the plaintiff goes on to give a further answer as to part of the sum demanded; so that he gives a double answer to the plea.

1840.

MONKMAN
against
SHEPHERDSON.

Wightman, contra. The replication shews a sufficient consideration, namely, the original service previous to the forfeiture. The cases of a revival of liability by the subsequent promise of a certificated bankrupt, or of a person who has come to full age since the debt was contracted, are analogous. So a party, whose debt is barred by the Statute of Limitations, may waive the statute, and make himself liable again. In every case a moral obligation is a consideration to support a promise, and the party may waive what would otherwise be a defence; just as a landlord may set up a forfeited lease by receiving rent. [*Coleridge J.* The defendant has not waived the forfeiture, but is stated to have afterwards agreed to pay notwithstanding the forfeiture.] The case of a bankrupt is quite as strong, for the certificate is an absolute discharge. [Lord *Denman C. J.* A discharge by parol after breach is insufficient; *Edwards v. Weeks (a)*.] The plaintiff actually continued in the defendant's service after breach; this is a sufficient consideration to support a promise to pay for all the plaintiff's services. [Lord *Denman C. J.* If the plaintiff had averred that he continued in the service in consideration that the defendant would waive the forfeiture, it might have been different; but here the continuance in service is a mere anecdote introduced into the repli-

(a) 2 *Mod.* 259.

cation,

1840.

MONKMAN
against
SHEPHERDSON.

cation without connection with the other averments in it, for the purpose of trying to help the deficiency of the pleadings by double matter.] Then, as to the new assignment, the declaration is general, and the plea *prima facie* covers the whole; so that the defendant would, on proving his plea as to any part of the wages, be entitled to a general verdict, unless the plaintiff took care to new assign so as to recover wages due for service since the cause of forfeiture. *Vivian v. Jenkin* (a) shews that the plaintiff may subdivide his demand in the replication in answer to a plea that in terms covers the whole declaration. The same form of pleading was adopted in *Solly v. Neish* (b).

Martin, in reply, was stopped by the Court on the first point. As to the second point, *Vivian v. Jenkin* (a) is an authority only to shew that the plaintiff might have replied as to 3*l.* parcel &c., a forfeiture; and as to the rest, that it became due after the forfeiture. The plaintiff, if he proves his replication and it be good in law, will recover all that he demands, though the new assignment should be struck out of the record.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

The question in this case arises upon demurrer to the replication and new assignment; and, as to the former, the objection principally relied on is the want of any consideration for the agreement therein stated.

(a) 3 A. & E. 741.

(b) 2 C. M. & R. 355. S. C. 5 Tyr. 625.

This

This objection we think is well founded. It is admitted by the replication, that the forfeiture mentioned in the plea had completely attached, and that the defendant was thereby absolutely discharged from the payment of the wages claimed in the declaration. It is not alleged in the replication, nor can we intend, that the plaintiff's future services were the consideration for a promise to pay the wages so forfeited; for, looking at the contract as set out in the plea, the forfeiture consequent on intoxication was not to operate prospectively; the wages that might be due when it occurred were to be forfeited, but the services were to continue, and the future wages would remunerate them on the footing of the original contract of hiring. There is no ground, therefore, for assuming that they were to be additionally remunerated by the payment of the forfeited wages; in other words, that they were the consideration for a promise to pay those wages.

Neither is it alleged, nor do we see any ground for intending, that the bygone services were the consideration for the promise. The effect of these services, as a legal consideration, was completely done away with by the forfeiture; and this was not disputed; but it was urged that they still operated as a moral consideration, sufficient to support an express promise, which this must be taken to have been. The facts of this case not rendering it necessary to express any general opinion on the doctrine of moral consideration, we shall say no more than this, that we agree with what fell from Lord *Tenterden* in *Littlefield v. Shee* (a), that it is a doctrine to be received with some limitation. But, whether the

1840.

MONKMAN
against
SHEPHERDSON.

(a) 2 B. & Ad. 811. See also *Eastwood v. Kenyon*, post. 438.

1840.

MONKMAN
against
SHEPHERDSON.

cases stand on a solid foundation or not, this is clear, that in all of them it is required, not merely that the debt should be in fact unpaid, but that there should be an obligation in conscience to pay it.

Now, if we try the present case by this principle, we cannot see that, where parties have voluntarily, and without fraud, come to such an agreement as this plea states, there is any moral obligation on the master to forego the penalty and to pay the wages, which by the terms of the contract had become forfeit. It may well be that the assent to this stipulation may have been the essential inducement to the master to hire the servant; but, without resorting to this, or any other similar supposition, it is enough to say, that the master could not be considered to act more or less honestly by waiving, or holding to, the forfeiture agreed on. We are of opinion, therefore, that this objection is a valid one.

This, however, will not dispose of the whole case; for besides the replication the plaintiff has also new assigned that only part of the monies in the declaration mentioned accrued due for services done before the intoxication alleged in the pleas, and that he sued, and has declared, as well for the money due for services after, as before, the intoxication. To this the defendant has demurred specially for duplicity, but it appears to us without any sufficient grounds. The declaration is general in form; and under it the plaintiff would have been entitled to give in evidence any demand for wages accruing due before the commencement of the suit. The plea treats the demand as entire, but assumes the action to be brought only for wages which had accrued due before the intoxication; the replication answers the whole plea by the agreement which we have just been considering,

considering, and it was necessary that it should do so. The plea could not be divided, for that is confined to whatever was due before the intoxication, and the answer is co-extensive with the excuse, and no more. If, therefore, the plaintiff had intended to sue only for the wages accruing after the intoxication, the plea would not have *hit at all*, and no replication at all would have been necessary. A new assignment alone would have been the plaintiff's proper course. But, as the plaintiff intended to sue both for the wages accruing due before, and those accruing due after, and the plea answers the former only, treating that as the only demand, the plaintiff might give such reply as he could to sustain the former part of his demand, and was also at liberty to new assign and point his declaration as to the latter. In this there is no duplicity either in form or substance; and the supposition that there is any arises from neglecting to observe that in truth the plea did not answer the whole extent of the declaration, that is, every thing which might be given in evidence under it. This part of the demurrer, therefore, fails; but, as it was divisible (a), the judgment will be for the defendant as to the replication, and for the plaintiff as to the new assignment.

S. Judgment for defendant on the replication; for plaintiff on the new assignment.

(a) See *antè* p. 412. note (a).

1840.

MONKMAN
against
SHEPHERDON.

1840.

Monday,
January 20th.

MEIGH *against* CLINTON.

The general turnpike act 9 G. 4. c. 77. (sects. 6, 7.) does not repeal the directions of stat. 3 G. 4. c. 136. sects. 82, 148, and sched. No. xiv., as to the form of agreement to subscribe money for making and repairing a road.

Under the later act, such agreement must be in writing; and an instrument in the following form, drawn up at a meeting of trustees, and sent forth for subscription, will not

warrant them in making calls upon a party signing it. "At a meeting," &c. "it appearing from the estimates," "that, to effect the object," &c. "namely the new line from "A. to L., "and the diversion" &c., "an expence of 4600*l.* will be involved," "it was proposed that the necessary applications be made without delay, in order to raise funds to meet the expenses referred to, and the gentlemen undernamed have proposed to subscribe such sums for the purpose as are set opposite to their respective names, and which it is proposed to secure" "by way of mortgage on the tolls."

If the agreement be not such as the acts require, an action for calls cannot be supported by the party's acknowledgment, after the works have been commenced under the act, that he is liable as having signed.

Assuming that the writing were a proper agreement, quære whether it would be a defence that before the act passed the trustees (with defendant's knowledge) altered the proposed line. And whether such defence ought to be specially pleaded. Also, whether it would be a defence that after the act passed (and before the above acknowledgment) the diversion was given up.

A local turnpike act (3 & 4 W. 4. c. liv.) empowered the trustees to take lands, making compensation, but enacted that the powers so given should cease if the trustees should not within three years agree and pay for the lands required for the purposes of the act, or so much thereof as they should deem necessary or proper. In an action for calls under this statute, Quære, whether it was a good plea, that the trustees did not within three years agree or pay for the lands required for the purposes of the act (specifying the purposes), or so much of the said lands as the said trustees deemed necessary or proper.

each

DEBT for road calls. The plaintiff declared as one of the trustees of the second district of road mentioned in stat. 3 & 4 W. 4. c. liv., local and personal, public, "for more effectually repairing the road from *Tunstall* in the county of *Stafford* to *Bosley* in the county of *Chester*, and from *Great Chell* to *Shelton* in the said county of *Stafford*, and for making a new line and diversion of road to communicate therewith." The declaration stated that before the making of the said act, viz. *November* 22d, 1832, defendant subscribed a certain sum of money, viz. 50*l.*, and certain other persons subscribed divers other sums of money, "for and towards the making and maintaining of a new line and diversion of road within the said second district;" and that after the passing of the act three calls were made (the making of which was set forth in detail) by order of the trustees,

each for 20 per cent., on the amount of the respective subscriptions. Plea 1. That defendant did not subscribe the said sum of 50% in the declaration mentioned, or any part thereof, for and towards the making and maintaining of a new line and diversion of road within the said second district of road in the said declaration mentioned, in manner and form &c. Issue thereon. Plea 13. That the trustees of the second district did not, within three years (a) next after the passing of the act, agree for, or cause to be valued and paid for, the messuages or tenements, lands or hereditaments, required for the purposes of the said act, that is to say, for the purpose of making and maintaining the said new line and diversion &c., for the making and maintaining of which defendant so subscribed as aforesaid, or so much of the said messuages or tenements, lands or hereditaments, as the said trustees deemed necessary or proper, or any part thereof, nor did the trustees, at any time before this suit was commenced, obtain the consent in writing of the owners of the said messuages, &c., or so much thereof &c., for the purchasing the same, or so much thereof &c., nor did the said owners &c. give such consent. Verification. Replication, that the trustees did, within three years &c., agree for so much of the said lands and hereditaments required for the purposes of the said act as they the said trustees deemed necessary or proper. Issue thereon.

On the trial before *Williams J.*, at the *Chester Spring* assizes, 1838, it appeared that, before the passing of stat. 3 & 4 *W. 4. c. liv.*, the trustees under an act then about to expire, relating to the above-mentioned roads, held a meeting, at which it was determined

1840.

 MEIGH
against
CLINTON.

(a) See stat. 3 & 4 *W. 4. c. liv. s. 22.*, p. 420. post.

1840.

MEIGH
against
CLINTON.

that a new act should be applied for, and the following document was drawn up.

“*Swan Inn, Hanley, 22d November 1832.*

“Subscription list.—At a meeting of the trustees of the *Great Chell* and *Shelton* road, holden this day, it appearing, from the estimates laid before it, that, to effect the object which the trustees have in view, namely, the new line from the *Albion Inn* in *Shelton* to *Lane End*, and the diversion from Mr. *Ratcliff*’s manufactory to *Sneyd Green*, an expense of 4600*l.* will be involved (including the land which will be required), it was proposed that the necessary applications be made without delay in order to raise funds to meet the expenses referred to, and the gentlemen undernamed have proposed to subscribe such sums for the purpose as are set opposite to their respective names, and which it is proposed to secure the repayment of, with interest, by way of mortgage on the tolls.”

This paper was signed by several trustees, as subscribers, at the meeting, and afterwards by other persons. Among these was the defendant, who signed as a subscriber of 50*l.* (a). The whole amount thus subscribed was 3250*l.* The clerk to the trustees stated in evidence that he solicited the bill in parliament on that subscription list. It received the royal assent, *May* 1833, and (by sect. 18) empowered the trustees of the second district to make and maintain the new line and diversion of road in the act and in the declaration mentioned, and for those purposes to take and use buildings, lands, &c., making or tendering satisfaction to the owners &c. By sect. 22 such powers were to cease (unless with the consent of the owners &c.) at the end of three years

(a) “*John Clinton. — £50.*”

next after the passing of the act, if the trustees should not within that time agree for, or cause to be valued and paid for, the messuages, lands, &c., required for the purposes of the act, or so much thereof respectively as they should deem necessary or proper. The new line was made by virtue of the act, but not to the extent contemplated in the document of *November 22d*, 1832, having been shortened, for want of adequate subscriptions, by a resolution passed before the act was obtained. A plan of the principal line, as altered, was deposited for public inspection with the clerk of the peace for *Staffordshire* before the bill was brought into parliament. For this line, as completed, 3250*l.* was sufficient. The proposed diversion was also given up, after the passing of the act, by a resolution of the trustees in 1836; and the lands which would have been necessary for that part of the undertaking were not purchased. The road made was a complete line, and was stated to be the most material part of the undertaking. The defendant, when required to pay the calls, in 1837, made no objection on the ground that part of the work had been abandoned, but admitted that he ought to pay, as he had signed the paper. At the trial it was contended, on his behalf, that the document of *November 22d* was not an agreement, but a mere proposal, and not binding, inasmuch as the 4600*l.* was never subscribed, and the contemplated line of road was in part given up: and that the plaintiff, even if he had bound himself by an agreement, was discharged when the trustees abandoned the diversion. The plaintiff had a verdict on the two above mentioned issues, leave being given to move, on the points taken, to enter a verdict for the defendant on either or both of the issues.

1840.

 MEIGH
 against
 CLINTON.

1840.

MEIGH
against
CLINTON.

Kelly, in *Easter* term, 1838, moved according to the leave reserved. On the first point he contended that the writing subscribed by the defendant was not an agreement in its terms, and was not, at any rate, such an agreement as is required by the General Turnpike Act, 3 G. 4. c. 126. s. 82. and schedule, No. xiv. (a). On the second point he cited *Lee v. Milner* (b), judg-

(a) Stat. 3 G. 4. c. 126. s. 82. enacts, "That if any person or persons shall agree to advance any sum or sums of money to be employed in the making or repairing of any turnpike road or highway intended to be made turnpike, and shall subscribe his, her or their name or names to any writing for that purpose, every such person shall be liable to pay every such sum or sums of money so subscribed, according to the purport of such writing; and in default of payment thereof within twenty-one days after the same shall become payable according to the purport of such writing, and shall be demanded by the person to whom the same is made payable by such writing, or if no person be named therein for that purpose by the treasurer of such turnpike or intended turnpike road, it shall and may be lawful for every such treasurer or other person to sue for and recover the same" &c.

Sect. 148 enacts, "That the forms of proceeding relative to the several matters contained in this act, which are set forth and expressed in the schedule hereunto annexed, may be used upon all occasions, with such additions and variations only as may be necessary to adapt them to the particular exigencies of the case, and that no objection shall be made or advantage taken for want of form in any such proceedings by any person or persons whomsoever."

Schedule, No. xiv., is as follows.

"Agreement by subscription for advancing money to make and repair a turnpike road or highway.

We whose names are subscribed, do agree to advance and pay the several sums wrote by us opposite to our names, unto

to be laid out and expended in the making and repairing a certain highway leading from to after an act of parliament shall be obtained for making the same turnpike road, upon having the tolls to be collected upon such turnpike road assigned and made over to us as a security for the respective sums so to be advanced by us, together with interest for the same after the rate of per centum per annum, which sums we do hereby severally agree to pay by instalments, in the following manner, *videlicet*; one fourth part thereof on the day of next; one other fourth part, (&c. &c. &c.)

Dated this day of ."

(b) 2 M. & W. 824.

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ments of *Parke* and *Alderson* Bs. A rule nisi was granted.

1840.

MRIGH
against
CLINTON

Sir *F. Pollock*, *Evans*, and *E. V. Williams*, now shewed cause. As to the first point; assuming that the present question arises on the General Turnpike Act, 3 G. 4. c. 126. s. 82., the agreement is not inoperative because it varies from the form given in the schedule. Supposing that, under that statute, it had been necessary to pursue the form, a greater latitude is now given by stat. 9 G. 4. c. 77. "to amend the acts for regulating turnpike roads," which enacts (s. 7.) "that the several and respective persons who shall subscribe for or agree to advance any money for or towards the making or maintaining any turnpike road or roads, or highway intended to be made turnpike, shall and they are hereby required to pay the sum or sums of money so subscribed, within such time or times, and in such parts and proportions, as shall be expressed in the writing which shall be subscribed by them or on their behalf, or as the trustees of any such turnpike road shall order and direct; and the same shall be demanded by and paid to such person or persons as the said trustees shall by any writing under their hands authorise to receive the same; and if any person or persons shall neglect or refuse to pay the same, or any part thereof, as aforesaid, it shall be lawful for the said trustees to sue for the same in the name of any one of such trustees or of their treasurer or clerk, and to recover the same," &c. It may, indeed, be a question whether the provisions of the former act on this subject are not altogether repealed by sect. 6 of stat. 9 G. 4. c. 77. But, even if the present case is to be governed by stat. 3 G. 4. c. 126., sect. 148 of that statute

1840.

—
 MICH
 against
 CLINTON.

enacts merely that the subjoined forms "may" be used; and it excludes objections grounded on want of form: therefore the only question here is, what the parties signing the paper really intended. The words are, "it was proposed;" but those who subscribed their names thereby acceded to the proposal, and made it a contract as to them. The case so far resembles *Snelling v. Lord Huntingfield* (a). Even if the defendant had not completely bound himself by his signature, he ratified the agreement afterwards by promising to pay, long after the original plan had been curtailed for want of subscriptions, and the alteration made public. It would be unreasonable to contend that parties who have given their name to such a document are discharged if the plan fail in the slightest particular, as if one shilling remain unsubscribed: but, if this were so, the rule would apply, that discharge by matter subsequent must be pleaded. [*Littledale J.* The declaration states that the defendant subscribed towards the making and maintaining a new line of road. He denies that this is the line.] Cases may be cited in which the Courts of Common Pleas and Exchequer have held defendants not liable as partners, where the companies in which they had taken shares began business with less capital and a smaller number of shareholders than had been originally proposed (b): but the present case is distinguished from those by the nature of the alteration, the notice to the defendant, and his final assent. Although the line here was shortened, the road was substantially the same, and the defendant had had the benefit of it when

(a) 1 Cro. M. & R. 20. S. C. 4 Tyrwh. 606.

(b) See *Fox v. Clifton*, 6 Bing. 776.; 9 Ring. 115.; *Pitchford v. Davis*, 5 M. & W. 2.

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he admitted his liability. As to the second point; issue has been taken on a plea which might have been demurred to; but the issue on the part of the plaintiffs is supported. If the trustees say that they have agreed and paid for so much of the lands as they deemed necessary and proper, no one can allege the contrary (a). The plea should have stated that certain lands were necessary and were not taken: or that the trustees had not taken enough for the purposes of the act. By sect. 22 of the local act, the powers of the trustees, as to taking lands, are to cease if not exercised within three years; but it does not appear in the present case that the money called for was required for taking lands. The language of *Tindal C. J.* as to the third plea in dispute (b) in *The London and Brighton Railway Company v. Wilson* (c) applies to this point. It cannot have been intended that a subscriber should set up this failure of powers in bar of an action for calls. Nor does the alleged omission of the trustees defeat the liability imposed by stat. 9 G. 4. c. 77. s. 7.

Kelly and Welsby, contra. The first issue, if the defendants succeed on it, decides this case. The declaration does not allege any agreement to pay, but rests the liability upon the fact of subscribing. The local act gives no authority to make calls; that power must depend on stats. 3 G. 4. c. 126., and 9 G. 4. c. 77. The defendant then could not bind himself by subscribing any document not conformable to those statutes. Stat. 9 G. 4. c. 77. s. 6. does not repeal stat. 3 G. 4. c. 126. s. 82., except as to the payment and recovery of

(a) See *Rex v. The Ouse Bank Commissioners*, 3 A. & E. 544.

(b) The fifth, as proposed by *Wilson*.

(c) 6 New Ca. 135.

1840.

MIGN
against
CLINTON.

1840.

 MEIGH
 against
 CLINTON.

sums to be subscribed; nor does sect. 7 alter it in any point relating to the manner of subscribing or the nature of the agreement: it only enables the trustees to modify the terms as to times of payment, and introduces a new provision as to the persons who shall be entitled to receive payment or enforce it by action. Now, the words of stat. 3 G. 4. c. 126. s. 82. are, "shall agree" (not propose) "to advance;" the liability to pay is "according to the purport of such writing;" and every material part of the clause supposes the existence of "such writing." And the provision of stat. 9 G. 4. c. 77. s. 7., "within such time or times, and in such parts and proportions, as shall be expressed in the writing which shall be subscribed by them," is intelligible only on the supposition that sect. 82, and the schedule, of stat. 3 G. 4. c. 126. are still in existence. Sect. 148 of that act permits some departure from the form in the schedule, but "such additions and variations only as may be necessary to adapt" the "forms of proceedings" to "the particular exigencies of the case." And it seems probable that this provision and the subsequent one, "that no objection shall be made or advantage taken for want of form in any such proceedings," refer to the proceedings before justices mentioned in sect. 145, and not the contracts provided for in the earlier part of the act. [*Coleridge J.* The schedule has a general title, "The Forms of Proceedings mentioned in the foregoing Act."] But, further, the objections here are not formal but substantial. The writing was not an agreement within stat. 3 G. 4. c. 126. On the face of it, all the parties propose, none accepts. The agreement required by the statute (as appears by the schedule, No. xiv.) is, for advancing money to be laid out in making and repairing

repairing a highway after an act of parliament shall have been obtained. Here the supposed contract had in view something which was to be done before an act passed, namely, the applying to parliament. And, if this could be a binding agreement at all, it could become so only on the whole sum being subscribed; *Pitchford v. Davis* (a). It was also a condition, that the proposed new line and diversion should be made. The tolls of that line and diversion were to be the security for the sums subscribed. The subsequent recognition relied upon by the plaintiff has no force, because it was not in writing. The statutes in question are as imperative on this point as the Statute of Frauds; and, that being so, the case falls within the authority of *Stead v. Dawber* (b) (recognised this term by the Court of Exchequer (c)), where it was held, under sect. 17 of stat. 29 Car. 2. c. 3., that, the parties having changed the day on which the contract was to be performed, and not having reduced the new agreement into writing, it could not be enforced. As to the second point; the trustees have abandoned the diversion, which was one of the objects contemplated by the proposal and the act of parliament, and have become unable to complete it by the lapse of the three years. (They referred to several sections of the local act, as shewing that the trustees had no right to abandon this part of the undertaking.) The making a diversion was one of the considerations on which the defendant consented to advance his money. The plea is correct in alleging that the trustees did not, within three years, agree or pay for the lands, or so much of them as they deemed necessary.

1840.

 Motion
against
CLINTON.

(a) 5 M. & W. 2.

(b) 10 A. & E. 57.

(c) *Marshall v. Lynn*, 6 M. & W. 109.

for

1840.

 MICH
 against
 CLINTON.

for making the said line and diversion. If the diversion was to be made at all, they must have deemed some land necessary. The replication, that they did within three years agree for so much of the said lands as they deemed necessary, is either insufficient, or sustainable only by proving that they had agreed for some lands before the three years expired, or that none were necessary. This part of the case raises a question like that in *Regina v. The Eastern Counties Railway Company*(a); but the question would be most properly discussed on motion for judgment non obstante veredicto.

LORD DENMAN C. J. I do not understand that our opinion is required on the second point. As to the first, I think that the document relied upon by the plaintiff was not an agreement, but only something put forward for the purpose of feeling the way, and ascertaining what support the intended bill was likely to meet with. It is clear that this instrument was not a compliance with stat. 3 G. 4. c. 126. If that act were repealed as to such matters by stat. 9 G. 4. c. 77., a question would arise which is not now before us. But I think that statute repeals only the provisions as to payment and recovery of the monies, and recognizes the previous enactments as to the writing to be subscribed. Whether the parties signing a document like that in question would be liable or not, as subscribers in a popular sense of the term, for contribution in respect of services done, or otherwise, it is unnecessary to say: the instrument is at all events not sufficient to establish a right of making calls. That is a specific power, and must be strictly pursued. The ratification is unavailing on the principle lately recog-

(a) 10 A. & E. 531.

nized in the Court of Exchequer (a); and the requisition of an act of parliament could not be dispensed with by the agreement of the parties. It might as well be said that they could dispense with the want of a stamp on a bill of exchange.

1840.

MEIK
against
CLINTON!

LITLEDALE J. This was not a valid agreement within stat. 3. G. 4. c. 126. "It was proposed" indicates merely something in contemplation. The trustees appear to have assembled and taken down a certain number of names, intending that a more formal agreement should be prepared afterwards. An agreement, to bind parties, should have been framed according to the schedule of stat. 3 G. 4. c. 126. The provisions of that statute, s. 82., are altered by stat. 9 G. 4. c. 77. ss. 6, 7., only as to the payment, and the persons who are to obtain it. The ratification was nothing, if the statutes required an agreement in writing.

WILLIAMS J. The only question is, whether stat. 9 G. 4. c. 77. repealed sect. 82 of the former act. I think that, on the true construction of the clauses, agreements under that section remained as before, except as to the times and mode of recovering payments, and perhaps in some other respects which are not material. The provision as to the writing to be subscribed continues as before. Subsequent promises to pay could have no effect, where the original foundation of liability was wanting.

COLERIDGE J. I concur in the opinion which has been expressed as to the effect of stat. 9 G. 4. c. 77. s. 6.

(a) *Marshall v. Lynn*, 6 M. & W. 109.; *Stead v. Dawber*, 10 A. & E. 57.

I think

1840.

MEIGH
against
CLINTON.

I think that it does not totally repeal sect. 82 of stat. 3 G. 4. c. 126. But, whether it does so or not, the party to be bound in a case of this kind must subscribe some written agreement. The words used at the beginning of stat. 9 G. 4. c. 77. s. 7. are "persons who shall subscribe for or agree to advance any money;" but the clause goes on to direct that they shall pay the money so subscribed "within such time or times, and in such parts and proportions, as shall be expressed in the writing which shall be subscribed by them" &c. Therefore, either the words "agree to advance" are redundant, or, if they have any meaning, there is no provision for enforcing what is merely agreed. The writing to be subscribed must contain an agreement for enforcing all the essential parts of the contract. In the instrument before us there is nothing but a proposal. The word "proposed" occurs in three places. It is "proposed that the necessary applications be made" to raise funds; and it is "proposed to secure the repayment" "by way of mortgage on the tolls." In these two instances the word clearly applies to something subsequent; why, then, should it have a different effect in the third, where it is said that "the gentlemen undernamed have proposed to subscribe" the sums set opposite to their names? If a written agreement was necessary, the subsequent ratification does not supply the want of it.

Kelly then contended that the defendant ought not, under the circumstances, to have the costs of the second issue imposed upon him.

Lord DENMAN C. J. If the verdict is entered for you on that issue, it will become a question whether the
thirteenth

thirteenth plea is good. I think the jury should be considered as discharged on that issue.

Rule absolute as to the first issue.

Discharge of jury to be entered as to the second.

1840.

MIGN
against
CLINTON.

DOE on the demises of THOMAS and NICHOLAS TREMEWEN *against* JAMES PERMEWEN.

Monday,
January 13th.

EJECTMENT for an estate called *Trewoof Wartha*, in the parish of *Burian* in the county of *Cornwall*.

On the trial before *Williams J.* at the *Cornwall* summer assizes, 1836, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

Thomas Tremewen, being seized in fee of the premises in question, made his will, dated 5th *February* 1765 and duly executed, by which he devised (inter alia) as follows: "I give and bequeath to my sister *Philadelphia* all my estate or estates in *Trewoof Wartha* during her natural life twelve months after my decease and after her decease then to her son *James* and his heir male living to attain the age of twenty-one years and in case of no such heir male lawfully begotten then to such issue and issues female and females the sum of 200*l.* of lawful money to be divided between them share and share alike and in case no such male or female living then the said 200*l.* to the children of my sister *Philadelphia* and the inheritance of the said estate for want of such male issue as aforesaid to redound to my

A devise to *A.* and his heir male living to attain the age of twenty-one, and, in case of no such heir male, remainder over, may give a vested estate tail to *A.* where an intention clearly appears to give him an interest beyond an estate for life.

Therefore, where testator, being seized of lands in fee, devised them to his sister for her life, remainder to her son *James* "and his heir male living to attain the age of twenty-one;" and in case of no such heir male, then to such issue female, the sum of 200*l.* to be divided between them, share and

share alike; and in case no such male or female living, then the said 200*l.* to the children of his said sister; "and the inheritance of the said estate, for want of such male issue as aforesaid, to redound to my heir male," &c. : Held, that *James* took a vested estate tail; that the words "living to attain," &c. were not part of a *descriptio personæ*, or a condition precedent, but a condition subsequent, defeating the estate tail if no such heir male lived to twenty-one.

male

1840.

Dox dem.
TREMWEEN
against
PERMEWEN.

male heir with paying the said 200*l.* as aforesaid." In place of the words "male heir" occurring at the close of this clause of the will, the testator appeared originally to have written the word "executor;" then to have passed his pen through that word and have written "brother" above it; afterwards to have expunged that word by smearing it before the ink was dry, and finally to have substituted the words "male heir."

Shortly after the execution of this will, and in the month of *February* 1765, the said *Thomas Tremewen* died without issue. He left one only brother, *Nicholas*, whom he appointed his executor, and three sisters, one of whom, *Philadelphia*, was married to *James Permewen*, and had a son also named *James Permewen*, who was living at the time of the testator's death. *Philadelphia Permewen* died on 18th *June* 1795, and her son *James*, who was never married, died on 19th *February* 1836, seized of the said estate. In the declaration the demises were laid on 1st *March* 1836. *Nicholas*, the brother of the testator, died on 26th *July* 1792, leaving two sons *Thomas* and *Nicholas*. One of the lessors of the plaintiff was a son of the last-mentioned *Thomas*, and claimed as heir of the testator. The other claimed as surviving devisee under the will of *Nicholas*, the brother of the testator *Thomas*.

The defendant proved that in *Trinity* term, 1766, *James Permewen* and *Philadelphia* his wife, and *James Permewen* their son, joined in suffering a common recovery, and that in *Michaelmas* term following they levied a fine to the use of *Philadelphia Permewen* for life, remainder to her said son *James*, his heirs and assigns for ever. In 1832 *James Permewen*, the son, duly made his will, by which he devised to his nephew

James

James Permewen (the defendant) all the property, real and personal, of which he should die possessed.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover possession of the above mentioned premises. The verdict to be entered according to the decision of the Court.

The case was argued in *Easter* term, 1839 (*a*),

Cresswell, for the plaintiff. The question is, whether *James Permewen*, the younger, who joined in the recovery in 1766, took an estate tail under the will of *Thomas Permewen*. The proper construction of the will is, that *Philadelphia* took an estate for life, remainder to her son *James* for life, with a contingent remainder to his heir male if such heir attained the age of twenty-one. The words "heir male" are descriptive of the person who is to take, provided he lives long enough. In the mean time *James* took only an estate for life, and therefore could not convert it into a larger estate by a fine or recovery. In an estate tail the continuance of issue ought to measure the duration of the estate; but here *James*, the son, might have heirs male of his body, and yet the estate would not continue if, on his death, the heir male had not attained twenty-one. No such estate is known to the law as an estate tail to which the heirs in tail respectively shall succeed only on attaining a certain age. There might be a succession of heirs male dying within age for a century. Nor is this a conditional limitation; for the event, on which the heir is to take the estate, does not affect the preceding estate of *James*. He also cited *Archer's Case* (*b*), and *White-lock v. Heddon* (*c*).

(*a*) April 26th. Before Lord Denman C. J., Littleale, Patteson, and Coleridge Js.

(*b*) 1 Rep. 66 b.

(*c*) 1 B. & P. 243.

Erle,

1840.

DOR DEN.
TREMEEWEN
against
PERMEWEN.

1840.

DOE dem.
TREMWEEN
against
PRIMEWEN.

Erle, contra. *James*, the son, who joined in the recovery, took an estate tail. The will shews that this was intended by the testator; and whatever was his intent, the known rules of construction, settled by repeated decisions, gave *James* that estate. It is evident that the testator meant to settle the inheritance; for he provides for its redounding to his heirs in case of the failure of the estate. The subsequent words "male issue," explain what he meant by heir male. Indeed, no other construction can get rid of the difficulties that will arise upon this will. Nothing but the clause respecting the attainment of the age of twenty-one can raise a doubt, and this provision ought not to control the legal effect of the devise. The words "heir male," used as they are in this will, have a technical import to which effect must be given, according to the rule laid down in *Jesson v. Doe dem. Wright (a)*, and *Doe dem. Gallini v. Gallini (b)*, unless there be inconsistent words which make it quite clear that the legal import was not the one contemplated by the testator; and that is not so here. The following authorities are decisive. *Co. Lit. 27. a.*, *Bawsy v. Lowdall (c)*, *Richards v. Bergavenny (d)*, *White v. Collins (e)*, *Dubber v. Trollop (g)*, *King v. Melling (h)*, *Jesson v. Doe dem. Wright (i)*, (which over-rules *Doe dem. Strong v. Goff (k)*), *Doe dem. Candler v. Smith (l)*, *Robinson v. Robinson (m)*, *Goodright dem. Parson v. Herring (n)*, *Goodtitle dem. Sweet v. Herring (o)*, *Cursham v. Newland (p)*.

(a) 2 *Bligh*. 1. 57.(b) 5 *B. & Ad.* 621. 640.(c) *Styl.* 249, 273.(d) 2 *Fern.* 324.(e) *Comyns*, 289.(g) *Ca. K. B. T. Hardw.* 160.(h) 1 *Fent.* 214. 225. S. C. in error, 2 *Ler.* 58.(i) 2 *Bligh*, 1.(k) 11 *East*, 668.(l) 7 *T. R.* 531.(m) 1 *Burr.* 38.(n) 4 *Doug.* 298.(o) 1 *East*, 264.(p) 4 *M. & W.* 101.

Cresswell,

Cresswell, in reply. The argument for the defendant requires that the words "living to attain the age of twenty-one," should be wholly rejected. For this there is no authority, though some of the cases cited shew that, if there be words clearly passing an estate tail, the legal consequences cannot be restrained by words inconsistent with such estate. Here the words do not tend to restrain an estate tail, but shew that no such estate was ever intended to pass. The rule in *Shelley's Case* (a) requires the limitation to heirs or heirs of the body to be *unconditional*, to make it unite with the preceding estate. *Fearne Cont. Rem.* 33. (9th ed.). Here there is a condition precedent to the vesting of any estate in the heir male of *James*. Where words are employed only, as here, to indicate the person, they are not used in a technical sense at all; nor do the subsequent words "male issue" fix upon the words "heir male" any technical meaning; for "issue" may mean, as it seems to mean in other parts of the will, *children*, that is, sons or daughters. If there be any uncertainty or difficulty in the subsequent disposition of the property in consequence of *James* only taking a life estate, the devise over will be void, and the heir at law will take.

1840.

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DOR DEM.
TREMWEEN
against
PERMEWEN.

Cur. adv. vult.

LORD DENMAN C. J. in this term (13th January) delivered the judgment of the Court.

The question in this case turns upon the estate which *James Permewen* takes under the following devise, which it is material to state in its very terms. On the one hand it is affirmed that he took only an

(a) 1 *Rep.* 93 b. 104 a.

1840.

—
 DOR DEM.
 TREMFEN
 against
 TREMFEN.

estate for life; on the other, an estate in tail. [His Lordship then read the extract from the will as stated *antè*, p. 431.]

These words taken all together, and construed with reference to intention, according to the rules established by numerous decisions, seem to us to import clearly an intention in the testator to give to *James* some interest beyond that of an estate for life. There is a devise to him and his heir of a certain description, and "the inheritance" is not to go over unless in default of such heir. With this guide to the general intention it is the duty of the Court to effectuate it, if the words be sufficient, and the intention be such as the law permits.

It is conceded that there would be no difficulty in holding this to be an estate tail, but for the words "living to attain the age of twenty-one." A devise to a man and his heir male would be clearly equivalent to a devise to him and the heirs male of his body; "heir" being *nomen collectivum*, and the words "of his body" having been frequently supplied. On the other hand, we feel the difficulty, *with* those words, of coming to that conclusion, if they are to be understood as part of the *descriptio personæ* and in the nature of a condition precedent, so that the quantity of the estate is to remain undetermined till the existence of an heir male for twenty-one years. We think, however, that in advancement of the testator's intention it is not necessary to understand them. If the testator had devised to *James* and his heir male, and, for default of such issue attaining to the age of twenty-one, then over, a good estate tail would have vested at once; the dying before twenty-one of the issue would have been a condition subsequent, and the remainder would have been barrable. The cases

cases of *Stocker v. Edwards* (a), *Manfield v. Dugard* (b), *Bromfield v. Crowder* (c), though on a different point, seem to furnish the principle on which we might come to that conclusion. Now a very slight transposition of the words in question would make the will what we have supposed; and we think such a transposition may properly be made in order to effectuate the testator's intention. The devise will then run thus: "to her son *James* and his heir male, and, in case of no such heir male lawfully begotten living to attain the age of twenty-one," then the provision as to 200*l.* to the issue female; and "the inheritance of the said estate for want of such issue male as aforesaid to redound" &c.

Our judgment therefore will be for the defendant.

Judgment for the defendant.

(a) 2 *Show.* 398.

(b) 1 *Eq. Ca. Ab.* 195.

(c) 1 *New Rep.* 313.

See *Doe dem. Cadogan v. Ewart*, 7 *A. & E.* 636.; *Doe dem. Dolley v. Ward*, 9 *A. & E.* 583.

1840.

DOE dem.
TREMWEEN
against
PERMEWEN.

1840.

EASTWOOD *against* KENYON.

Defendant may shew, under non assumpsit, that the promise was within stat. 29 Car. 2. c. 3. & 4., and was not in writing.

Section 4. of that statute, as to promises to pay the debt of another, contemplates only promises made to the person to whom another is liable; therefore a promise by defendant to plaintiff to pay *A. B.* a debt due from plaintiff to *A. B.* is not within the statute.

A pecuniary benefit, voluntarily conferred by plaintiff and accepted by defendant, is not

such a consideration as will support an action of assumpsit on a subsequent express promise by defendant to reimburse plaintiff.

Therefore, where the declaration 'in assumpsit stated that plaintiff was executor of the father of defendant's wife, who died intestate as to his land, leaving defendant's wife, an infant, his only child and heir; that plaintiff acted as her guardian and agent during infancy, and in that capacity expended money on her maintenance and education, in the management and improvement of the land, and in paying the interest of a mortgage on it; that the estate was benefited thereby to the full amount of such expenditure; that plaintiff, being unable to repay himself out of the personal assets, borrowed money of *A. B.* on his promissory note; that defendant's wife, when of age and before marriage, assented to the loan and the note, and requested plaintiff to give up the management of the property to her, and promised to pay the note, and did in fact pay one year's interest on it; that plaintiff thereupon gave up the management accordingly; that defendant, after his marriage, assented to the plaintiff's accounts, and upon such accounting a certain sum was found due to plaintiff for monies so spent and borrowed; that defendant, in right of his wife, received all the benefit of plaintiff's said services and expenditure, and thereupon in consideration of the premises, promised plaintiff to pay and discharge the note:

Held, on motion in arrest of judgment, that the declaration was bad as not disclosing a sufficient consideration for defendant's promise.

ASSUMPSIT. The declaration stated, that one *John Sutcliffe* made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned: that he afterwards died without altering his will, leaving one *Sarah Sutcliffe*, an infant, his daughter and only child and heiress at law surviving: that after making the will *John Sutcliffe* sold the property mentioned therein, and purchased a piece of land upon which he erected certain cottages, but the same were not completed at the time of his death; which piece of land and cottages were at the time of his death mortgaged by him; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress at law: that after the death of *John Sutcliffe*, plaintiff duly proved the will and administered to the estate of the deceased: that from and after the death of *John Sutcliffe* until the said *Sarah Sutcliffe* came of full age,

plaintiff,

plaintiff, executor as aforesaid, "acted as the guardian and agent" of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and necessary improvement of the said cottages and premises in which the said *Sarah Sutcliffe* was so interested, and in paying the interest of the mortgage money chargeable thereon and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and having been beneficial to the interest of the said *Sarah Sutcliffe* to the full amount thereof: that the estate of *John Sutcliffe* deceased having been insufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own monies, and did advance, a large sum, to wit 140*l.*, for the purpose of the said expenditure; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one *A. Blackburn*, and, as a security, made his promissory note for payment thereof to the said *A. Blackburn* or his order on demand with interest; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said *A. Blackburn*: that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said *Sarah Sutcliffe*, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof: that when the said *Sarah Sutcliffe* came of full age she had notice of the premises, and then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one *J. Stansfield* as her agent, the controul and management of the

1840.

EASTWOOD
against
KENYON.

1840.

EASTWOOD
against
KENTON.

said property, and then promised the plaintiff to pay and discharge the amount of the said note; and thereupon caused one year's interest upon the said sum of 140*l.* to be paid to *A. Blackburn*. That thereupon plaintiff agreed to give up, and did then give up, the controul and management of the property to the said agent on behalf of the said *Sarah Sutcliffe*: that all the services of plaintiff were done and given by him for the said *Sarah Sutcliffe*, and for her benefit, gratuitously and without any fee, benefit, or reward whatsoever; and the said services and expenditure were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said 140*l.* That afterwards defendant intermarried with the said *Sarah Sutcliffe*, and had notice of the premises, and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the same, and upon such accounting there was found to be due to plaintiff a large sum of money, to wit &c., for monies so expended and borrowed by him as aforesaid; and it also then appeared, that plaintiff was indebted to *A. Blackburn* in the amount of the said note. That defendant, in right of his wife, had and received all the benefit and advantage arising from the said services and expenditure. That thereupon in consideration of the premises defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed and *A. Blackburn*, the holder thereof, was always willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the amount thereof, defendant did
not,

not, nor would then, or at any other time pay or discharge the amount &c., but wholly refused &c.

Plea: Non Assumpsit.

On the trial before *Patteson J.* at the *York Spring* assizes 1838, it was objected on the part of the defendant that the promise stated in the declaration, and proved, was a promise to pay the debt of another within the Statute of Frauds 29 *Car. 2. c. 3. s. 4.*, and ought to have been in writing; on the other hand it was contended that such defence, if available at all, was not admissible under the plea of Non Assumpsit. The learned judge was of the latter opinion, and the plaintiff had a verdict, subject to a motion to enter a verdict for the defendant.

Cresswell, in the following term, obtained a rule nisi according to the leave reserved, and also for arresting judgment on the ground that the declaration shewed no consideration for the promise alleged. In *Trinity Vacation*, 1839 (*a*),

Alexander and *W. H. Watson* shewed cause. The defence is not available under the general issue. [Upon this point, *Buttemere v. Hayes* (*b*), decided on the same day, was mentioned to the Court, and was considered conclusive.] Then, the promise is not within the statute, which requires a writing only where the promise is "to answer for the debt, default or miscarriages of another person." Here there is no other person in default, but the promise is to pay the amount

(*a*) June 19th. Before Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge J.*s.

(*b*) 5 *M. & W.* 456. The same point arose in *Williams v. Burgess*, 10 *A. & E.* 499.; and *Jones v. Flint*, 10 *A. & E.* 753.

1840.

EASTWOOD
against
KENYON.

1840. to the plaintiff. [*Patteson J.* It is rather a promise to pay *Blackburn*; a promise to take up the bill.] In substance it is a promise to pay the plaintiff what he is liable to pay *Blackburn*. No case has yet decided that a promise to pay the promisee's own debt to a third person is within the statute, which evidently contemplates the debt or default of third persons. The same point might be made in every case of an implied promise to indemnify, as where the plaintiff accepts a bill for the defendant's accommodation, or where the drawer is sued on the default of the acceptor. It is said by *Parke J.* in *Thomas v. Cook* (a), that if the plaintiff, at the request of the defendant, paid money to a third person, a promise to repay need not be in writing. In *Castling v. Aubert* (b), a contract to indemnify the plaintiff if he gave up a lien, was held not to be within the statute. *Williams v. Leper* (c), is to the same effect. *Green v. Cresswell* (d) may be relied on, where a promise to indemnify the plaintiff against the consequence of becoming bail for a third party was held to require a writing; but there the defendant made himself answerable for the default of another, and so came exactly within the words of the statute. Then, as to the consideration; it has been distinctly held, that a moral obligation will support an express promise. There must be something done by the plaintiff at the defendant's request, or an act done [for the defendant's benefit must be ratified by an express promise to pay; in either case, an action will lie. [*Coleridge J.* How are we to know the difference between an express and

—
EASTWOOD
against
KENTON.

(a) 8 B. & C. 728. 732.

(b) 2 East, 325.

(c) 3 Burr. 1886.

(d) 10 A. & E. 453. See also *Cresswell v. Wood*, Id. 460.

an implied promise on the pleadings?] After verdict an express promise must be presumed. [*Coleridge J.* The same question may arise on demurrer.] In *Lee v. Muggeridge (a)*, executors were held liable on a promise by the testatrix, after the decease of her husband, to pay a bond made by her when under coverture, on the express ground that she was morally bound to pay it. The same doctrine was upheld in *Seago v. Deane (b)*, *Atkins v. Hill (c)*, and in several other cases, cited in the note to *Wennall v. Adney (d)*. A stronger case of moral obligation can hardly arise than the present, where the plaintiff is admitted to have been for many years the faithful guardian and manager of the estate of the defendant, while she was under age, and where the defendant and his wife have received great pecuniary benefit from the plaintiff's acts.

1840.

EASTWOOD
against
KENTON.

Cresswell, contra. The case is within the words, as well as the spirit and mischief of the statute. It is a promise to discharge the note. The words of the breach in the declaration all point at the note. If the defendant had paid *Blackburn*, could it have been contended that the promise was to pay the plaintiff; and that the payment to *Blackburn* was no answer to an action by the plaintiff? This is in truth a promise to pay *Blackburn* the debt due to him from the plaintiff, and it is not the less within the statute, because the promise is made to the plaintiff and not to *Blackburn* himself, for the act does not say *to whom* the promise is to be made. The case of an accommodation acceptor, and the other cases of implied promises to indemnify are not in point.

(a) 5 Taunt. 36.

(b) 4 Bing. 459.

(c) Cowp. 284.

(d) 3 B. & P. 247.

They

1840.

—
 EASTWOOD
 against
 KESTON.

They are either promises to pay the defendant's own debt, or they are cases of liability arising by operation of law, where no real promise is ever made or required, and which are, therefore, not within the mischief of the statute. In *Williams v. Leper* (a) and *Castling v. Albert* (b), there was a purchase by the defendant from the plaintiff. In the former, the landlord's right of distress was bought; in the latter, the plaintiff's lien on certain policies. Here the plaintiff has sold nothing to the defendant. Then as to the consideration: Suppose *A.* gives a parol guarantee to a tradesman to induce him to supply goods to another, can *A.* be made liable on a subsequent parol promise? Such a construction would defeat the statute; yet the case is in principle the same as the present, and the moral obligation much stronger. A promise may be evidence of a precedent request, but has no efficacy in itself. What is it that constitutes the moral obligation here? [Not the expenditure on the estate, for no duty was cast on the plaintiff to lay out any thing on it, nor had he any right to interfere with the management; and if he had, the defendant had at that time no interest in it at all. If the honesty of the outlay causes the moral obligation, then it is indifferent whether it turned out profitable, or not, to the defendant or his wife. It would support a promise, though the property had been damnified by it. If the benefit constitutes the consideration, then whenever a party benefits another against his will, a subsequent promise will be a ground of action. If it had appeared that the wife was liable at the time of her marriage, then the consequent liability of the defendant might have supported his promise; but

(a) 3 Burr. 1886.

(b) 2 East, 325.

no liability of the wife is stated, nor is it said that she promised in consideration of the premises. As to the agreement of the plaintiff to give up the control and management of the property, he had no right to either, and therefore nothing to give up; and if he had, it is not alleged to have been the consideration of the wife's promise. The doctrine of moral obligation as a ground for a promise must be limited to those cases where the law would have given a clear right of action originally, if some legal impediment had not suspended or precluded the liability of the party. The ordinary instances are infancy, bankruptcy, and the Statute of Limitations; and these were the cases referred to by Lord *Mansfield* when he laid down the above doctrine. As a general rule, it cannot be supported; *Littlefield v. Shee* (a). The law is correctly laid down and the cases explained in the note to *Wennall v. Adney* (b).

1840.

 EASTWOOD
 against
 KENTON.
Cur. adv. vult.

In this term (*January* 16th), the judgment of the Court was delivered by

LORD DENMAN C. J. The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing we decided, in conformity with the case of *Buttemere v. Hayes* (c), that this defence might be set up under the plea of Non Assumpsit.

The facts were that the plaintiff was liable to a Mr. *Blackburn* on a promissory note; and the defendant, for

(a) 2 B. & Ad. 811.

(b) 3 B. & P. 247. See also the argument of the Attorney-General in *Haigh v. Brooks*, 10 A. & E. 315, 316.

(c) 5 Mee. & W. 456.

1840.

EASTWOOD
against
KENTON.

a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to *Blackburn*. If the promise had been made to *Blackburn*, doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.

The second point arose in arrest of judgment, namely, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, whilst the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of *Blackburn* to whom he had given his promissory note; that the defendant's wife, while sole, had received the benefit, and, after she came of age, assented and promised to pay the note, and did pay a year's interest; that after the marriage the plaintiff's accounts were shewn to the defendant, who assented

to

to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to *Blackburn*; that the defendant in right of his wife had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to *Blackburn*.

1840.

EASTWOOD
against
KENTON.

Upon motion in arrest of judgment, this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of *Wennall v. Adney* (a), and the conclusion there arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Loyd v. Lee* (b); debts of bankrupts revived by subsequent promise after certificate; and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly

(a) 3 B. & P. 249.

(b) 1 Stra. 94.

examined.

1840.
 ———
 EASTWOOD
 against
 KENTON.

examined. *Barnes v. Hedley* (a) decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. *Lee v. Muggeridge* (b) upheld an assumpsit by a widow that her executors should pay a bond given by her while a feme covert to secure money then advanced to a third person at her request. On the latter occasion the language of *Mansfield* C. J. and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the Judges of this Court in *Cooper v. Marten* (c), where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these there was any allusion made to the learned note in 3 *Bosanquet and Puller* above referred to, and which has been very generally thought to contain a correct statement of the law. The case of *Barnes v. Hedley* (a) is fully consistent with the doctrine in that note laid down. *Cooper v. Martin* (c) also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a court of equity would hold as to a stepfather's liability, and rather to have as-

(a) 2 *Tunst.* 184.

(b) 5 *Tunst.* 36. On a previous suit in equity to declare the bond a charge on the separate estate of the testatrix, the Master of the Rolls had refused relief. *S. C.* 1 *V. & B.* 118.

(c) 4 *Est.* 76.

sumed

sumed the point before us. It should, however, be observed that Lord *Ellenborough* in giving his judgment says, "the plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury;" and undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessities furnished at his request in regard to which the law raises an implied promise. The case of *Lee v. Muggeridge* (a) must however be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should however be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to *Littlefield v. Shee* (b), tried by *Gaselee* J. at N. P., when that learned judge held, notwithstanding, that "the defendant having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promises declared upon." After time taken for deliberation this Court refused even a rule to shew cause why the nonsuit should not be set aside. *Lee v. Muggeridge* (a) was cited on the motion, and was sought to be distinguished by Lord *Tenterden*, because there the circumstances raising the consideration were set out truly upon the record, but in *Littlefield v. Shee* the declaration stated the consideration to be that the plaintiff had sup-

1840.

EASTWOOD
against
KENYON.

(a) 5 *Tunst.* 36.(b) 2 *B. & Ad.* 811.

plied

1840.

—
EASTWOOD
against
KENTON.

plied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord *Tenterden* added, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee v. Muggerridge (a)*, where the doctrine is wholly unqualified.

The eminent counsel who argued for the plaintiff in *Lee v. Muggerridge (a)* spoke of Lord *Mansfield* as having considered the rule of nudum pactum as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney (b)* shews the deduction to be erroneous. If the former, Lord *Tenterden* and this Court declared that they could not adopt it in *Littlefield v. Shee (c)*. Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to

(a) 5 *Trent*. 36.(b) 3 *B. & P.* 249.(c) 2 *B. & Ad.* 811.

claims

claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v. Hewson* (a) shews that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a ratihabitio, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shewn, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that

1840.

EASTWOOD
against
KENYON.

(a) 7 T. R. 348.

1840.

EASTWOOD
 against
KENTON.

case have been available under the plea of Non assumpsit.

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of *England*.

Lamplough v. Brathwait (a) is selected by Mr. *Smith* (b) as the leading case on this subject, which was there fully discussed, though not necessary to the decision. *Hobart* C. J. lays it down that "a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference"; a difference brought fully out by *Hunt v. Bate* (c), there cited from *Dyer*, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration; but a promise to pay 20*l.* to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

The distinction is noted, and was acted upon, in *Townsend v. Hunt* (d), and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord *Mansfield*, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

(a) *Hob.* 105.(b) 1 *Smith's Leading Cases*, 67.(c) *Dyer*, 272 (a).(d) *Cro. Car.* 408.

Upon

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

1840.

S. Rule to enter verdict for defendant, discharged.

EASTWOOD
against
KENTON.

Rule to arrest judgment, absolute (a).

(a) The opinion ascribed to Lord *Mansfield* respecting the rule of nudum pactum, appears to be not an unreasonable deduction from the cases of *Pillans v. Meier*, 3 Burr. 1663.; and *Williamson v. Losh*, reported from the paper books of *Ashurst J.* in *Chitty on Bills*, 75, note (x), (9th ed.). Both are commented on by the Lord C. B. *Slynn*, in *Rann v. Hughes*, 7 T. R. 350. note (a). See also *Evans's General View of the Decisions of Lord Mansfield*, vol. i. p. 422.

THURMAN *against* WILD and Another.

TRESPASS for breaking and entering plaintiff's close, and expelling him therefrom.

Plea; that defendants committed the trespasses complained of by the command and as the servants of one *P. B. Barry*, to whom they afterwards delivered possession of the said close, and who claimed to be lawfully entitled thereto; that plaintiff afterwards re-entered into it, and expelled *Barry* therefrom; that afterwards plaintiff was desirous to become a tenant to *Barry* of a certain house whereof *Barry* was then possessed, and that *Barry* was desirous of regaining peaceable possession of the close in which &c.; that *Barry* had commenced a suit against

In an action for a trespass committed by defendant as servant and by command of *P. B.*, acceptance of satisfaction by plaintiff from *P. B.* is a defence.

Where defendant introduces an immaterial averment in his plea, plaintiff cannot in his replication so traverse the matters of the plea as to include such immaterial

averment in the issue: Therefore where defendant in trespass pleaded that the trespass was committed by command of *P. B.*, and then stated an executed accord between plaintiff and *P. B.* with the consent of defendant, and acceptance thereof by plaintiff in satisfaction of the trespasses: Held, that a replication traversing the accord and execution thereof with the consent of the defendant, was bad on special demurrer, for that, as no rights of the defendant appeared to be compromised by the accord, his consent was unnecessary.

1840.

—
THURMAN
against
WILD.

plaintiff for breaking and entering the close in which &c., which suit plaintiff was desirous of compromising upon payment of costs without damages, and that plaintiff and *Barry* were both desirous of putting an end to all disputes between them; that it was thereupon, and after the trespasses complained of, agreed between them by an agreement in writing signed by *Barry* and plaintiff that *Barry* should let to plaintiff the said house for one year at a certain rent, and that plaintiff, on entering upon the said house, should deliver up peaceable possession of the close in which &c. to *Barry*, and should forfeit 100*l.* in case he should thereafter obstruct *Barry* in the enjoyment of it; and that *Barry* should not further prosecute his suit against the plaintiff, but plaintiff should pay his costs without any damages. Averment, that *Barry* did accordingly cease to prosecute his suit, and delivered to plaintiff peaceable possession of the house in the agreement mentioned, and “did, with the consent of the defendants, enter into, give, and deliver the said agreement to and with the plaintiff, and did cease to prosecute his said suit against the plaintiff on payment of the costs thereof without any damages, and did deliver to the plaintiff peaceable possession of the said house for, and in full satisfaction and discharge of, the said several trespasses in the declaration mentioned; which said agreement and cessation of the prosecuting of the said suit, and the said delivery of the said house, the plaintiff then accepted and received of and from the said *Barry* in full satisfaction and discharge of the said trespasses committed by the defendants.” Verification.

Replication; that *Barry* “did not, *with the consent of the defendants*, enter into, give, or deliver the said alleged

alleged agreement in the plea mentioned to and with the plaintiff, *and* cease to prosecute the said suit on payment of the alleged costs thereof without any damages, *and* deliver to the plaintiff peaceable possession of the said house for and in full satisfaction and discharge of the said several trespasses in the declaration mentioned; nor did the plaintiff accept or receive from the said *Barry* the alleged agreement *and* cessation of the prosecuting of the said suit, *and* the said delivery of the said house in full satisfaction and discharge of the said trespasses, in manner and form” &c. Conclusion to the country.

1840.

 THURMAN
 against
 WILD.

Demurrer, assigning for special causes that the replication was double; that it tendered an immaterial issue, and contained a negative pregnant; that the traverse was too large, and traversed in the conjunctive instead of the disjunctive, and put the defendant upon unnecessary proof, &c. Joinder.

The demurrer was argued at the sittings in banc in *Hilary* vacation, 1839 (*a*).

Whitehurst, for the defendants. The form of replication puts the defendants on proof of their consent to the satisfaction, which is immaterial and need not have been averred in the plea. If the plaintiff has accepted satisfaction from the defendants' master, that is in itself a bar to an action against the defendants. A denial of any accord *with their consent* is therefore a negative involving an admission of a complete defence, viz. an accord without such consent. In trespass for cutting

(*a*) *February* 5th and 6th, before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js. *Williams* J. was absent on the 6th.

1840.

 THURMAN
 against
 WILD.

trees, if defendant plead that he cut them by plaintiff's command, replication, that defendant did not cut them by his command, is a negative pregnant and bad. *Bacon's Ab. Pleas and Pleading*, I. 6. (a). Several other cases to the same effect are mentioned in *Com. Dig. Pleader*, (R. 5.). The replication is also double. It traverses too much of the plea, and puts in issue both the delivery and the acceptance in satisfaction, which is improper where the acts are not contemporaneous. It also traverses conjunctively all the acts alleged to have been done in satisfaction, whereas if any one was done and accepted in satisfaction, it is a defence; *Moore v. Boulcott* (b). [As these objections were not noticed by the Court, the argument on them is omitted.]

Wightman, *contra*. The consent of the defendants may have been unnecessary, but they have made it material by alleging it as part of the agreement. Upon a traverse, the defendants would have to prove an agreement by consent of all parties, including themselves, or there would be a variance. If the issue is larger than it need be, the fault is with the defendants, who have introduced on the record a needless allegation. In *Brogden v. Marriott* (c) the plea alleged that one *A. B.* wilfully, as servant or agent of the plaintiff, interrupted the trotting of the horse; plaintiff replied that *A. B.* "did not, as the servant or agent of the plaintiff, interrupt" &c.; the replication was objected to as double and ambiguous, for it either denied both the agency and the interruption, or left it uncertain which it denied; but the court

(a) Vol. vi. 309. (7th ed.).

(b) 1 *New Ca.* 323.(c) 2 *New Ca.* 473.

held the traverse to be single and sufficient. [*Coleridge* J. An interruption by one who was not the plaintiff's agent would have been no defence.] A negative pregnant is not objectionable, if it be on an issue tendered to the point of the action; *Com. Dig. Pleader* (R. 6.). It is not clear that the consent of the defendants might not have been material; but if not, then the traverse of it in the replication is equally immaterial, and the mention of consent may be considered as struck out of the issue, which will then be, substantially, a traverse of the acceptance in satisfaction.

1840.

THURMAN
against
WILD.

Whitehurst, in reply. The immateriality of the averment will not justify including it in the traverse. In *Lane v. Alexander* (a), where the plaintiff stated a grant by copy on 1st of *June*, 43 *Eliz.*, the defendant was not permitted to traverse the grant on 1st of *June*, for the day was immaterial, and ought not to have been involved in the traverse.

Cur. adv. vult.

In this term (*January* 22), the judgment of the Court was delivered by

LORD DENMAN C. J. In this case, to a declaration for trespass on land, and expulsion therefrom, the defendants plead, that they acted under the command and as the servants of one *P. B. Barry*, to whom they delivered up possession of the close in which, &c.; that there were disputes between the plaintiff and *Barry*, and an arrangement of those disputes, contain-

(a) *Cro. Jac.* 202.

1840.

THURMAN
against
WILK.

ing several particulars which are set out, and the performance by *Barry* of those agreed to on his part averred; and they conclude that the said *P. B. Barry* *with the consent of the defendants* did enter into, give and deliver the said agreement in writing, and did cease to prosecute his said suit, and did deliver to plaintiff the peaceable possession of the said dwelling house, &c. for, and in full satisfaction and discharge of, the said several trespasses in the said declaration mentioned, which said agreement in writing and cessation of the prosecuting of the said suit, and the said delivery of the said dwelling house, &c., he the said plaintiff then accepted and received of and from the said *P. B. Barry* in full satisfaction and discharge, &c."

No question was made upon this plea, but the replication traversed conjunctively, and in terms, all the particulars above stated; and to this several objections are made on special demurrer.

The only one which we shall consider, was, that the defendants having alleged an accord and satisfaction between the plaintiff and *P. B. Barry*, entered into on the part of the latter *with their consent*, the plaintiff in his replication had traversed not merely the accord and satisfaction but the consent of the defendants, which, it was urged, was immaterial. No authority was cited on this point, nor have we found any directly in point.

In *Edgcombe v. Rodd (a)*, to trespass for an assault and false imprisonment the defendants, who were magistrates, pleaded that the trespasses were committed by their warrant on an information by one *C. M.*

(a) 5 East, 294.

of a misdemeanor alleged to have been committed by plaintiff against 1 *W. & M. c. 18. s. 18.* (the Toleration Act); whereupon the plaintiff was committed by them for want of sureties until the next quarter sessions; and that afterwards, and before the sessions, it was agreed between the plaintiff and *C. M.*, *with the consent of the defendants*, that *C. M.* should not further prosecute the plaintiff for his alleged offence, and should consent to his discharge at the sessions: the plea then alleged performance of this agreement at the sessions, and that the plaintiff then and there accepted *C. M.*'s not further prosecuting him, and his consent to the discharge and the discharge accordingly, in full satisfaction and discharge of the trespasses. This plea was held bad, principally indeed on the ground that the agreement, as between the plaintiff and *C. M.*, was either illegal if the plaintiff were guilty, or void for want of consideration if he were innocent; but also on the ground that *the satisfaction, if any, proceeded from a stranger.* Lawrence J. asked what act the magistrates had done which was to be taken as a satisfaction to the plaintiff for the injury received? for their *consent* that *C. M.* should not prosecute was a mere *nullity*; and when it was urged that the satisfaction need not proceed from the party himself, but that it was enough if the party injured *accept* any thing in satisfaction of the trespass from a stranger, he cited *Grymes v. Blofeld (a)*, where to debt on bond for 20*l.* plea of a surrender of a copyhold to the use of the plaintiff by a stranger in satisfaction of the 20*l.*, with acceptance by the plaintiff, was held no good plea; and that report is

1840.

 THURMAN
against
WILD.
(a) *Cro. Eliz.* 541.

certainly

1840.

THURMAN
against
WILD.

certainly as he cited it, and the case is found in *Com. Dig. Accord.* (A. 2.) to the same effect; but the reporter, in a note, observes truly that in *Rolle's* abridgement of the same case (a), the judgment is stated exactly the other way, to have been for the defendant, and that the plea was good. This circumstance, and some inaccuracies which are manifest in *Crokes'* report, certainly detract from the authority of the case in *East* as to this point, which depends on the report in question. But independently of this, that case and the present are clearly distinguishable; for the plea alleging here that the trespass was committed by the defendants *by the command and as the servants of P. B. Barry*, and that the locus in quo had by them been delivered up to him, he claiming to be lawfully entitled to the possession and having then entered and become possessed of it, it is impossible to consider him as a stranger to the trespasses in the sense in which *C. M.* was rightly so considered in the case in *East*. There the magistrates received, indeed, their information from *C. M.*, but they acted upon that independently and judicially in imprisoning the plaintiff; and to that act *C. M.* was an entire stranger; whereas, in the principal case, *P. B. Barry* is the author of the act, and it is done for his benefit. Has he not then sufficient connection with the transaction to make a satisfaction for it, which shall enure to the benefit of all the defendants? Although not sued in this action, he must be taken upon these pleadings to have been a co-trespasser. Now it was held in *Hillman v. Uncles* (b) that an accord

(a) 1 *Rol. Ab.* 471. *Condition* (F). See also *Fitz. Ab. Barre.* 120 a. pl. 166., and the judgment of Lord Parker C. J. in *Hawkshaw v. Rawlings*, 1 *Stra.* 23.

(b) *Skinner*, 391.

and

and satisfaction between the plaintiff in trespass and one of two trespassers not sued, may be pleaded in bar by the other, although the satisfaction were, by the plaintiff's request, made to a third person.

1840.

THURMAN
against
WILD.

But if *P. B. Barry* were able to make this accord and satisfaction for the trespass generally, is it a necessary preliminary that the defendants should have given their consent? Now we do not go so far as to say that, under some circumstances, this consent might not be necessary; for a case might be supposed, in which a party, sued in trespass, might have, or think he had, cross rights of action against the plaintiff, which might be compromised by an accord made by his co-trespasser behind his back. No such supposition, however, can be made here, where the defendants admit by their plea an unjustifiable act done, and themselves adopt the satisfaction made by *P. B. Barry*. In this case, therefore, the accord and satisfaction will operate according to their true principle, which is the consent of the plaintiff. He has chosen to accept from one of the trespassers a compensation for the whole trespass, and in discharge of all parties; and whether this was rendered with or without the consent of some of them, he is equally barred as against all.

We are of opinion, therefore, that the defendants, in alleging their consent, made an immaterial averment. *Moore v. Boulcott (a)*, however, is an authority with which we agree, that this does not exonerate the plaintiff from the necessity of taking a material issue. There the action was for an attorney's bill; the plea, that it was brought for fees at law *and* in equity, and no bill delivered; the replication traversed that it was brought

(a) 1 *New Ca.* 323.

1840.

THURMAN
against
WILD.

for fees at law *and* in equity ; and this was held ill ; for the defence would have been good if the action were brought for either ; and although the plea had unnecessarily alleged both, the replication was bound to take an issue which, if sustained, would shew that the plaintiff had a good cause of action.

Upon the ground, therefore, that the plaintiff here has taken an immaterial issue, we think the judgment must be for the defendants.

S.

Judgment for defendants.

1840.

BRUCE and The BATH River Navigation Com- *Tuesday,*
pany *against* WILLIS and Two Others. *January 21st.*

REPLEVIN for a barge. Defendants avowed taking the barge as a distress for a poor-rate, by virtue of stat. 43 *Eliz. c. 2.* Plea in bar, *de injuriâ.* On the

By stat.
10 *Ann. c. 8.*
(private) certain
persons were
authorised to
make a river

navigable, to form new cuts through the adjoining lands, to erect bridges &c., and to set out towing-paths for men, first giving satisfaction to the owners of lands to be dug or used. Commissioners were appointed to decide differences and to settle what satisfaction every owner or occupier of land should have for any portion of his land so to be used, and what share of such purchase-money or satisfaction every tenant or other person should receive: and in certain cases the commissioners were to summon a jury to assess damages and recompense to the owners and occupiers of such lands as should be used for or damaged by making the river navigable, for their respective estates and interests therein, or for the loss or damage they should sustain: and on payment of the sums assessed the undertakers were authorized to have, use and enjoy the lands for their proper use and benefit. The navigation was made common to all persons, on payment of toll to the undertakers.

By stat. 47 *G. 3. sess. 2. c. cxxix.* (local and personal, public), reciting that the undertakers had purchased lands and formed the navigation, power was given them to make a towing-path for horses. The act enabled them to purchase lands, or to agree with land-owners for damage to be done; the purchase-money, or satisfaction, in case of disagreement, &c., to be assessed by commissioners as under the former statute, or by a jury; and on payment the undertakers might enter, and thereupon all estate &c. of any person in the lands was to vest in, and become the sole property of, the undertakers; judgments of the commissioners and verdicts of juries to be transmitted to the clerk of the peace, and deemed records of the sessions. A right of way over the towing-path was reserved to the owners of the lands through which it was made.

By inquisition, taken in 1725, a jury found that certain lands were necessary for making a cut, &c., part of the navigation, and assessed damages for the same, as a full recompense to be paid by the undertakers for the same lands, thirty years' purchase at so much per acre; part of the sum being awarded to termors, the residue to the lords of the fee. Damages were also awarded to various persons for loss of tithes, common &c. and for trees, on the lands to be used. By another inquisition taken in 1813, for determining the satisfaction to certain land-owners for such of their lands as should be taken for the navigation, and for the damages to be sustained thereby, the commissioners awarded an annual payment by the undertakers, for certain land required for a horse towing-path, such payment to be a satisfaction to all persons having any interest in the lands; and they awarded so many years' purchase for other lands.

The undertakers made a lock, canal, and towing path, with culverts and bridges, upon the lands mentioned in the inquisitions, paying full remuneration. No conveyance was ever executed. Part of the breadth of land taken for the towing-path was used as a public footway, which existed before the act of *G. 3.*: the residue was depastured by the owners of the adjoining land, who, by the last-mentioned act, had right of way over it for the purpose of access to the river. The path was, in general, not divided from the adjacent fields. Gates, &c., were kept on it by the undertakers for the benefit of the neighbouring land-owners.

The undertakers having been rated to the poor for their towing-path, canal and locks: Held,

1. That the land used for those works was vested in the undertakers under the said acts, without any conveyance.

2. That, even if this were not so, they were liable to poor-rate as the exclusive occupiers.

trial

1840.

BRUCE
against
WILLES.

trial before *Parke B.*, at the *Gloucester Spring assizes*, 1857, a verdict was taken for the defendants, subject to the opinion of this Court on a case, which was stated, in substance, as follows.

The defendants were chapelwarden and overseers of the hamlet of *Hanham*, in the parish of *Bitton*, *Gloucestershire*, which maintains its own poor. The plaintiffs are the present proprietors of the navigation of the river *Avon*, from *Bath* to or near *Hanham Mills*, under stat. 10 *Ann. c. 8.* (private), “for making the river *Avon*, in the counties of *Somerset* and *Gloucester*, navigable from the city of *Bath* to or near *Hanham’s Mills*,” and stat. 47 *G. 3. sess. 2. c. cxxix.* (local and personal, public), “for enabling the proprietors of the navigation of the river *Avon*, in the counties of *Somerset* and *Gloucester*, from the city of *Bath* to or near *Hanham’s Mills*, to make and maintain an horse towing-path, for the purpose of towing and haling with horses or otherwise, boats,” &c., “up and down the said river.” The acts were to be taken as part of the case.

By sect. 1 of stat. 10 *Ann. c. 8.* (private) (*a*), the mayor, aldermen, and common council of the city of *Bath*, their successors and assigns, or such persons as they should nominate as therein directed, were empowered to make the said river navigable from the said city to or near *Hanham Mills*, to make any new cuts through the lands adjoining or near the river, and to make bridges &c., and to set out towing-paths and ways for men for hauling boats and other vessels passing along the river and cuts, first giving satisfaction to the owners of such lands as should be dug or otherwise

(a) See this more fully set out in *Rex v. Thomas*, 9 *B. & C.* 114. 117, note (a). See also *Buckeridge v. Ingram*, 2 *Ves. Jun.* 651. 654. &c.

used for pathways or carrying on the navigation. By sect. 2 certain persons therein named were appointed commissioners for settling all matters about which any difference might arise between the said undertakers and the proprietors of the said lands, and were also empowered to settle what satisfaction every owner and occupier of such lands, adjoining or near the said river, as should be intended to be made use of for the effecting of the said undertaking, should have for such proportion of his lands as should be made use of as aforesaid, and what share of such purchase money or satisfaction every tenant or other person should receive: and in certain cases therein mentioned the commissioners were authorised to summon a jury to assess such damages and recompense as they might think fit to the owners and occupiers of such lands, or any part thereof, as should be used for or damaged by making the said river navigable as aforesaid, for their respective estates and interests therein, by reason of the cutting, digging, removing, or using any land for the purposes aforesaid, or for the loss or damage they should or might sustain thereby. Upon payment of the sums assessed or agreed upon, the said undertakers were authorised to have, use, and enjoy the said lands to and for their own proper use and benefit.

By sect. 4 the undertakers were authorised to take certain tolls; and by sect. 8 the said river *Avon* was made an open, common and navigable river, and all persons were permitted to navigate the same on the payment of the rates and dues limited by that act.

By stat. 47 G. 3. sess. 2. c. cxxix. (local and personal, public), sect. 1, it is recited (a) that the said mayor, &c., had nominated certain persons therein mentioned to make

(a) Sect. 1.

1840.

BRUCE
against
WILLIS.

the

1840.

 BRUCE
 against
 WILLIS.

the said river navigable, and to have the powers, &c., for the doing thereof, in the said first act mentioned. And that the said nominees had theretofore proceeded to purchase lands and hereditaments, and to make the said navigation and works; but, the said act of 10 *Ann.* not containing any power to make a horse towing-path, and the tolls arising from the said navigation having become vested in the company of Proprietors of the *Kennet and Avon* canal, and certain other persons therein named, the said company, and the said other persons named (a), were empowered by this act to make a towing-path on the side of the said navigation, and from time to time to repair the same, for drawing with horses, &c., any boats or other vessels navigating on the said navigation between *Bath* and the mill pool below *Hanham Mills*.

By sect. 8 the proprietors and their successors, &c., were empowered to set out and make from time to time, and to repair and keep in repair, along the banks of the said navigation, a convenient towing-path for drawing with horses, &c., any boats or other vessels using the said navigation, and to erect any bridge or culvert across any river, brook, ditch, or other places, for the better setting out and making the said towing-path. Sect 9 limited the breadth of the towing-path.

By sect. 5 certain maps, describing the line of the towing-path, were directed to remain in the custody of the clerks of the peace for the counties of *Somerset* and *Gloucester*, to the end that all persons might have liberty to inspect &c. And by sect. 11 the proprietors were enabled to purchase, to them and their successors, &c.,

(a) "The said company of proprietors of the navigation, *A. B., C. D.,*" &c., "proprietors of the tolls" &c. "and shares as aforesaid, their several and respective successors, heirs, nominees, and assigns."

for

for the purposes of this act, any lands necessary for the same, and contained in the said maps, or to treat with the owners and proprietors of the said lands for the damage to be done thereto respectively in the execution of the purposes of the act, and to appropriate the same for the purposes aforesaid (a).

By virtue of the said act of *Anne*, the predecessors of the plaintiffs made the said river navigable; and they and the plaintiffs have so continued the same up to the present time, and have made divers new cuts, where necessary, in and through the lands adjoining or near to the said river, for the better and more convenient navigation thereof, and also have set out and appointed

(a) The following sections were not set out in the case.

Sects. 13, 14 provided for the assessment, by the commissioners as under stat. 10 *Ann. c. 8.*, or by a jury, of purchase-money or satisfaction if parties interested should refuse to treat &c., or any dispute should arise. And by sect. 19 it was enacted that, on payment or tender of the sums agreed for, or determined by the commissioners, or assessed by a jury, the proprietors of the navigation, their heirs, successors and assigns, might immediately enter upon the lands, and thereupon such lands &c., "and all the estate, use, trust, and interest of any person or persons therein," should "from thenceforth be vested in and become the sole property of the said proprietors of the said tolls and shares, their heirs," &c., "to and for the purposes of this act, for ever."

By sect. 20, "every judgment and determination of the said commissioners which shall be submitted to and acquiesced in by the parties concerned, and each and every verdict of a jury shall be transmitted to and be kept by the clerk of the peace, or other person having the custody of the records of the quarter sessions for the county where the matter in question shall arise, and shall be deemed to be records of such quarter sessions to all intents and purposes."

By sect. 28 it was enacted, "That all owners and occupiers of lands, through which the said road or towing-path, roads or towing-paths shall be made, shall have free liberty to use the same so far as the same shall adjoin to their respective lands as a footway, bridleway, and driftway, for their cattle, and to and from their watering-places and landing-places at the said river, but no other person shall be authorized to use the same except for purposes relating to the said navigation, and except in such places as the course of the said intended towing-path or any part thereof hath been of right used as a common or private way."

1840.

 BAUCK
 against
 WILLIS.

1840.

BRUCE
against
WILLIS.

towing-paths for men for hauling &c.; and also by virtue of the same act the said predecessors of the plaintiffs made a new cut, parcel of the aforesaid new cuts, and a lock, and set out a like towing-path for men by the side of the said new cut and locks, in certain lands within the said hamlet of *Hanham*, and they and the plaintiffs have continually hitherto maintained, and still do maintain the same, being the cut or canal, and the locks, described in the rate hereinafter mentioned. The length of the said cut and locks is 100 yards; and all vessels passing upon the said river from *Bath* to *Bristol*, or *Bristol* to *Bath*, must in their voyage pass through the same.

After the passing of the said act of 47 G. 3., the plaintiffs, by virtue of that act, made, and have continually hitherto maintained, through the lands upon the sides of the said river and cuts, a towing-path for drawing boats, &c., with horses, part of which, running partly by the river and partly by the side of the cut and locks, and containing about two miles in length, is situate in *Hanham*. A public footway runs for about . . . yards along the same line as the said towing-path, in *Hanham*, and was used as such before the passing of the statute of 47 G. 3.; and of the quantity in breadth permitted to be taken for a towing-path by that act, viz. twenty feet in the straight parts and thirty in the crooked parts, about six in breadth is used for that purpose; the remainder is depastured or otherwise occupied by the landowners and occupiers adjoining the said pathway, and who have free liberty under the act to use the towing-path, so far as the same shall adjoin to the respective lands, as a footway, bridleway, and driftway for their cattle to and from their watering-places and landing places at the said river. There are
several

several gates, rails, and wickets across the towing-path in *Hanham*, which are the property of, and are kept up by, the plaintiffs, according to the said act, for the benefit of the occupiers and owners of the land through which the horse towing-path is made. The said towing-path in *Hanham* is formed of gravel, stones, and other proper materials, and has always been repaired by the plaintiffs and their predecessors. There are also in the said hamlet several bridges and culverts over streams of water, over which bridges and culverts the said towing-path passes, and which were built and are repaired by the plaintiffs. The greater part of the said towing-path in *Hanham* is not divided by any fence, ditch, or other boundary from the fields by the sides of which it passes, but lies open to the same, so that the cattle put into the said fields may stray upon the towing-path; but one part, in *Hanham*, containing about 286 yards in length, is fenced off, on the opposite side from the river, from an orchard in the occupation of *Samuel Nurse*, which fence is made by the owner and occupier of the land adjoining the said towing-path, and not by the company; and there is a gate put up and maintained by the plaintiffs across each end of the part so fenced off as aforesaid.

The occupiers of the fields by which the said towing-path passes have never since the making thereof been rated to the poor for the land used for the towing-path, but are rated only for the quantity of land which each field contains over and above the land so used. The towing-path is used only by the plaintiffs and such persons as are authorized to use it by the said acts.

The plaintiffs are in such possession of the said cut and locks and towing-paths in the said hamlet of *Han-*

1840.

BRUCE
against
WILLIS.

1840.

 BAUCK
 against
 WILLIS.

ham, as the said acts of parliament give them under the facts herein stated.

The plaintiffs have paid to the owners of the said lands annual sums for the same, taking receipts in the following forms. "25th *March* 1837. Received of the *Kennet and Avon and Bath River Navigation Company* 2*l.* 6*s.* 3*d.* for one year's rent of land used for towing-path, due this day." "29th *March* 1825. Received" &c. "for four years' rent of towing-path through my lands in *Michael Meadow*, due 29th *September* 1824, 5*l.* 12*s.*" (Other receipts were set out, not materially differing from these.)

The act of 47 G. 3. gives the power to the said proprietors of the navigation to purchase land for the towing-path: no conveyance was ever made to the said company, for that purpose, of any land in *Hanham*: but two inquisitions were taken under the aforesaid acts, copies of which were to be considered as part of this case.

The predecessors of the plaintiffs, and the said plaintiffs, before making the towing-paths, bridges, culverts, and other works appertaining thereto, gave a satisfaction and remuneration to the respective owners and proprietors of such lands, &c., respectively, as were required for making the said towing-path, &c., for the damage done to them, by payment to some of them of such a general sum or annual payment in respect of the loss and injury occasioned by the making the said cuts, locks, towing-path, and other works, and to others of such a sum in gross by way of damages for the loss and injury aforesaid, as were a full recompence.

The plaintiffs and their predecessors have ever since the making of the said navigation received for their own use the tolls granted by the said acts. (Then followed

lowed a statement as to the profits, which, it was alleged, had been much increased by the making of the towing-path for horses, and as to the traffic.)

A rate for the relief of the poor of the said hamlet was duly made &c. in *March* 1836, whereby the plaintiffs were rated as follows : —

Robert Bruce, Esq., and Bath River Navigation

Company, in respect of their towing-path, and

also the cut or canal and the locks thereunto

appertaining - - - - - £13

The case then stated a refusal by plaintiffs to pay, and the proceedings thereon, to the issuing of a distress warrant, under which the defendant avowed taking &c.

The question for the opinion of this Court was, whether the action would lie. If it would, then a verdict was to be entered for the plaintiffs for four guineas: if not, the present verdict to stand.

Of the two inquisitions referred to in the body of the case, and annexed to it, the first purported to be taken *August* 25th, 1725, before certain commissioners under the statute of 10 *Anne*, and a jury summoned and impanelled pursuant to that statute. The jurors, having viewed the after-mentioned lands, and heard evidence on oath for the undertakers and for the proprietors &c. of lands &c., and persons claiming common, found that a water-cut and water-lock was needful to be made in a common meadow called *Sydenham*, and that for the said cut and lock, and for banking the earth &c., “the said undertakers have occasion for the ground there staked, and containing in breadth” &c. “And the said jurors” &c. “do find first that one pole and three quarters of a pole,

1840.

BRUCE
against
WILLIS.

1840.

Barce
against
Willis.

part of a plot of land being the inheritance of *Henry Creswick, Esq.*, and sixteen poles" &c. (designating the several parcels of land to be taken, and the quantities of estate vested in the then owners) "all lie within, and are lands so as aforesaid necessary for the water-lock and cut, banking the said earth, and for towing-paths and wharfs on the said banks: and the said jurors, with the approbation of the proprietors of the said lands and their agents, as also of the said undertakers, do assess damages for the same as a full recompence to be paid by the said undertakers for the same lands, and for such other part of the said meadow, adjoining to the said river or cut, as they shall use for a toll house and wharf, thirty years' purchase at and after the rate of 40s. per acre according to statute measure, that is to say: to every of the lords or owners for the land wherein no other person hath any term, the full number of thirty years' purchase; and to such termors as have estates depending on one life, ten years' purchase out of the said thirty years' purchase; and the residue to the lords of the fee thereof." Similar apportionments were made in the cases of other termors. There was a like finding, assessment, and apportionment as to other lands necessary for a towing-path from the east end of the said cut, &c. Damages were assessed to the tithe-owner for the tithe of hay &c. which would be lost by the said path or cut; also compensation to the overseers of the poor for rights of common, and to the proprietors of lands, and their tenants, for trees to be cut down, &c., on the lands to be used. And the commissioners adjudged accordingly.

The second inquisition purported to be taken, *April 21st, 1813*, at a meeting of the commissioners under the two statutes, "for the purpose of interposing and
mediating

mediating between the proprietors of the said navigation and certain owners and occupiers of lands" adjoining or near the river &c., "and for settling and determining what satisfaction such persons shall have for such proportion of their lands as shall be taken and used by the said proprietors for the purposes of the said acts, or either of them, and for the damage that shall be thereby sustained." The first adjudication stated that, *T. S.* having attended the meeting on summons, and it appearing that he was the owner and occupier of land in &c., part of which was then required by the proprietors of the navigation for making a horse towing-path, the commissioners, having heard evidence as to the value of the said land and the damage that would be thereby done thereto, did adjudge &c. that the proprietors should pay *T. S.*, his heirs or assigns, *5l. 5s.* per annum for every acre of such land, and so in proportion for any less quantity which should be taken or made use of by the proprietors for the purpose aforesaid in addition to the present foot towing-path of four feet wide, for which satisfaction had already been made; which annual payment was to be considered a satisfaction and remuneration to all persons having any interest or claim whatsoever in or to the said lands. There were other adjudications, ordering the proprietors to pay certain owners of freehold lands so many years' purchase for lands discharged of commonable rights, and annual sums for other lands, which latter payments were to be considered a satisfaction &c., as above.

Sir J. Campbell, Attorney General, for the plaintiffs. The plaintiffs are not occupiers of the cut and locks, nor of the towing-path; and if, in respect of either,

1840.

 BAUCE
 against
 WILLIS.

1840.

BRUCE
against
WILLIAMS.

they are not rateable, the rate, being laid conjointly, is bad; *Rex v. Welbank* (a). Then, first, as to the cut and locks. It is true that the company were held rateable for these in *Rex v. Thomas* (b); but there it was assumed that they were "purchasers" of the soil, and therefore that the case fell within the authority of *Rex v. The Mersey and Irwell Navigation Company* (c), where locks and cuts were held rateable on the same ground. *Rex v. The Aire and Calder Navigation Company* (d), decided soon afterwards, illustrates the distinction acted upon in the two former cases, between proprietors of the soil and grantees of an easement. Here, the soil of the cut, locks, and towing-path has never been conveyed to the company; they pay a sum by way of compensation, or for a license, but the land remains in the original owners. The first inquisition shews that the company took, under it, no greater right in the soil of the locks and cut than the easement which they already enjoyed in the bed of the river. One criterion of the amount of right is, whether they could maintain trespass in respect of this land; and clearly they could not. It is land which they have permission to use for a limited purpose. The cut is part of the public highway; every one may pass through it on paying toll, and without doing so the ancient bed of the river could not be used. In fact, the cut is not distinguishable, as to rights of user, from the natural channel. A work of this kind is so subject to the incidents of a public highway that, in *Rex v. The Severn and Wye Railway Company* (e), where, by statute, the public were authorized to use the

(a) 4 M. & S. 222.

(b) 9 B. & C. 114.

(c) 9 B. & C. 95.

(d) 9 B. & C. 820.

(e) 2 B. & Ald. 646.

railway on paying certain rates of tonnage for goods carried, this Court granted a mandamus calling on the company to reinstate the railway, which they had broken up. Secondly, as to the towing-path, this case is like *Rex v. Jolliffe* (a), where a party was held not rateable for way-leaves. *Rex v. Bell* (b) may be cited for the defendants: but there the party who was held rateable had the exclusive possession of the soil. Here, not only does the land remain vested in the owners, but they, and all the Queen's subjects, have, by statute, the right of using it. The obligation to repair does not carry with it an exclusive right in the soil. The omission hitherto to rate owners of the adjoining fields for the portion of land used as the towing-path is no argument for the liability of the plaintiffs.

1840.

 BRUCE
 against
 WILLIS.

Greaves, contra. On the adjudication of the commissioners, all the land in question vested in the company by the two statutes. An actual purchase and conveyance, if ever necessary, could be so only where the land was taken by agreement. None are stated to have been made in *Rex v. Thomas* (c). Stat. 10 Ann. c. 8. (private) corresponds in all material respects with stat. 7 G. 1. stat. 1. c. 15., upon which *Rex v. The Mersey and Irwell Navigation Company* (d) was decided: and there it was held that the locks and cuts were rateable; and Lord *Tenterden* seems to have thought that the towing-paths might be so. At least the company are the occupiers of these lands for the purposes of the acts, and have, as was said by this Court in *Rex v. The Chelsea Water-*

(a) 2 T. R. 90.

(b) 7 T. R. 598.

(c) 9 B. & C. 114.

(d) 9 B. & C. 95.

1840.

 BAUCK
 against
 WILLIS.

works Company (a), “the exclusive right in a portion of the soil,” “though for a limited purpose only;” and, if so, they are rateable, as the waterworks company was held to be in that case. If a party is occupier, it is no matter for what term or by what interest. In turnpike acts it is usual to provide that the road shall not be liable to rate, otherwise the purchasers of land for such a road would be rateable. So, if the tolls of a market were vested in a person who also had a property in the soil, he would be liable (*b*). The receipts here furnish some information as to the company’s interest. [Lord Denman C. J. I do not think much turns on them. If the company had come in at a remote period, they might have been more material; but here we know the history of the proceedings.] Stat. 47 G. 3. sess. 2. c. cxxix. s. 1. expressly recites that the nominees of the mayor, aldermen, and common council of *Bath* have “proceeded to purchase lands and hereditaments,” and to make the navigation, according to the former act. By sect. 19, on payment of the sum due from the company in respect of any lands, whether as purchase-money or satisfaction, and upon entry into such lands, they are vested in the company for ever. Sect. 28 gives liberty to the owners of the adjoining lands to enter upon the towing-paths; this would be needless if such owners had parted with nothing but an easement in the land used for those paths. This argument was adopted by Tindal C. J., when delivering judgment in *Alexander v. Bonnin* (*c*). [Greaves then commented on other clauses of stat. 47 G. 3. sess. 2. c. xxix., which, as the judgment did not turn upon them, are not here noticed.]

(a) 5 B. & Ad. 156.

(b) See *Rex v. Bell*, 5 M. & S. 221.

(c) 4 New Ca. 799.

The inquisitions cannot be construed as giving, in any instance, less than an estate from year to year; and that is sufficient to render the tenants rateable. It makes no difference that the towing-path has, for the most part, no fence dividing it from the adjoining lands; a close is not the less distinct because it has an ideal boundary. The rateability of navigation property, including the towing-paths, has often come in question; but in no instance has it been made a point that the path was or was not visibly separated from land belonging to other parties than the proprietors of the navigation (*a*). And here the case states that a portion of the towing-path is fenced off; this, however small, would justify the rateing. The company may be exclusive occupiers of the soil to an extent rendering them liable to rate, though others have the use of a footway over the land, or a right to take the herbage: *Rex v. The Mayor, &c. of London* (*b*), *Rex v. The Chelsea Waterworks Company* (*c*). At all events there is an occupation of the land by the culverts, bridges, and other structures, and by the materials laid down to form the towing-path; and this renders the company liable on the principle which has been applied in many cases to pipes laid in the soil. So in *Rex v. Bell* (*d*) parties were held rateable for a waggon-way, being a substantial structure by

1840.

 BRUCE
 against
 WILLIS.

(*a*) On this point he referred to *Rex v. St. Mary Leicester*, 6 M. & S. 400.; *Rex v. The Birmingham Canal Company*, 2 B. & Ald. 570. *Rex v. Palmer*, 1 B. & C. 546.; *Rex v. The Oxford Canal Company*, 4 B. & C. 74.; *Rex v. The Regent's Canal Company*, 6 B. & C. 720.; *Rex v. Kingswinford*, 7 B. & C. 236.; *Rex v. The Trustees of the Duke of Bridgewater*, 9 B. & C. 68.; *Rex v. Lower Milton*, 9 B. & C. 810.; *Rex v. The Oxford Canal Company*, 10 B. & C. 163.; *Rex v. Chaplin*, 1 B. & Ad. 926.; *Rex v. The Chelmer and Blackwater Navigation Company*, 2 B. & Ad. 14.; *Rex v. Woking*, 4 A. & E. 40.

(*b*) 4 T. R. 21.

(*c*) 5 B. & Ad. 156.

(*d*) 7 T. R. 598.

which

1840.

BRUCE
against
WILLIS.

which they exclusively occupied the ground, though the Court had held differently in the case of a way-leave, enjoyed by the rated party in common with another person: *Rex v. Jolliffe* (a). The decision in *Rex v. The Severn and Wye Railway Company* (b), cited on the other side, had no reference to the question of occupation. *Hollis v. Goldfinch* (c) and *Buckeridge v. Ingram* (d) were cited on behalf of the company in *Rex v. Thomas* (e). *Hollis v. Goldfinch* (c) was decided on a misdirection, by which the jury were left open to a wrong impression on the matter of fact. It is true that, in *Buckeridge v. Ingram* (d), Sir R. P. Arden, M. R., said, as to part of the property now in question, "This act" (10 Ann. c. 8., private) "cannot be construed to have taken out of the proprietors and given to this corporation the soil: but it has given them a right in and over the soil and certain real rights arising in and out of the soil." But the material question there, as to dower, did not depend upon the soil having passed; and, if that ruling applies only to the bed of the river, it does not aid the present plaintiffs; if it extends to the locks and cut, it is contrary to many subsequent decisions of this Court. Both the last-mentioned cases were brought before the Court in *Rex v. The Mersey and Irwell Navigation Company* (g), where the rate, as to cuts and locks, was affirmed.

Sir J. Campbell, Attorney General, in reply. It may be admitted that, if the company here have any exclusive

(a) 2 T. R. 90.

(b) 2 B. & Ald. 646.

(c) 1 B. & C. 205.

(d) 2 Ves. jun. 651.

(e) 9 B. & C. 114.

(g) 9 B. & C. 95.

interest

interest in the land, they need not, for the purpose of rateability, have the fee. But here the inquisitions do not confer any exclusive interest; they do not profess to pass the estate, but only to settle a remuneration for damage, which rather implies that the land continues in the original owners. The company take only an easement, enjoyed concurrently with the rights of other persons. The case therefore differs from *Rex v. The Chelsea Waterworks Company* (a), and from *Rex v. The Mayor, &c. of London* (b), where the defendants were held liable because they had the soil. *Buckeridge v. Ingram* (c) is not much relied upon by the plaintiffs; but *Hollis v. Goldfinch* (d) is a strong authority in their favour, if, as they contend, there is no real distinction here between the new navigation and the original channel of the river. The point in *Alexander v. Bonnin* (e), referred to on the other side, was quite clear in that case, but arose under totally different circumstances.

1840.

 BRUCE
against
WILLIS.

Lord DENMAN C. J. This case has been argued with a profusion of learning, and with reference to facts, stated in the case, many of which do not at all lead to a decision. The main question is, whether, under the circumstances, the plaintiffs were the exclusive occupiers of land in respect of which they are rated? And I think it is clear they were such occupiers. Suppose a trespasser took possession of land, and devoted it to his own purposes, and, an action being brought, the jury, on a trial, gave the proprietor damages equivalent to the full value of the land, after

(a) 5 B. & Ad. 156.

(b) 4 T. R. 21.

(c) 2 Ves. jun. 651.

(d) 1 B. & C. 205.

(e) 4 New Ca. 799.

which

1840.

BAUCE
against
WILLIS.

which the trespasser still kept possession without any conveyance. If the overseers then rated him as the occupier of the land, could he say "I am not the owner?" And, if he said so, might not the parish-officers reply that it signified nothing to them whether he was the owner or not? But that is a weaker case than the present, for the statute 10 *Ann. c. 8.* enables the navigation company to purchase lands, and directs that, if the parties cannot agree, a jury may be summoned to assess such damages and recompense as they think fit to the owners and occupiers of such lands as shall be used for or damaged by making the river navigable, for their respective estates and interests therein, or for the loss or damage they shall sustain thereby; and, on payment of the sums assessed or agreed upon, the undertakers are authorized to have, use, and enjoy the lands to their own use and benefit. Here an inquisition is taken; thirty years' purchase is awarded for lands; where there is no term in them the whole is given to the landlord; where there are terms, a portion to the termor and the residue to the lord. And, under this adjudication, the company take the land entirely to their own purposes. No doubt at all can exist under these circumstances. It is unnecessary to go particularly into stat. 47 *G. 3. Sess. 2. c. cxxix.*; but the words of that act give the right to the company still more fully. It would be trifling with language to say that they are not, then, the exclusive owners. The reservation of a foot-way over the towing-path does not defeat their occupation; if it could, the greatest landowner in the country would, in many instances, not be the occupier of his own lands. The company are the owners of the soil, though the public have some rights in it, and may come upon

upon it, paying for that liberty where the statutes require payment.

1840.

Buck
against
Wills.

LITLEDALE J. By the statute of *Anne* the commissioners are to determine what share of purchase-money or satisfaction every tenant is to receive; and, on payment of the sum assessed, the undertakers are authorized to have, use, and enjoy the lands to and for their own proper use and benefit. That implies more than a mere easement. It is objected that no conveyance of the lands has been shewn. The commissioners are authorized to assess payments, both by way of purchase-money and by way of compensation for damages. There is, in the first inquisition, an assessment made expressly for particular damages; the other part of the inquisition makes an assessment of recompence for the land which the company are to take and enjoy for their own use; it is, in effect, a settlement of the purchase-money. The second inquisition recites stat. 47 G. 3. sess. 2. c. cxxix. I think that under that act, also, a conveyance is unnecessary. Where the assessment is made by a jury, the verdict recorded at the sessions is a sufficient title; a conveyance would be useless. Here the compensation is ordered by the commissioners to be made in some instances by payments at so many years' purchase, in others by yearly payments for ever; and, although the statute does not in terms say that the lands shall vest on payment of a rent, I think that the purchase-money might be paid, within the meaning of the act, either by a gross sum or by annual ones. The latter payments are directed by the commissioners to be made as a satisfaction to all persons having any interest or claim. I think that the
company

1840.

BRUCE
against
WILLIS.

company were purchasers under both statutes, though not by voluntary sale. But it was not necessary that they should have the legal estate; for, if they had been let in under a defective conveyance, or none, the land in their occupation was still a subject of rate. If there were no decision applicable, the case is clear on both statutes.

WILLIAMS J. I admit that a case of this kind must depend on its own particular circumstances; but here I never had a doubt, as to the cut and locks, that they were to be considered as in the case of ordinary canals; the company had converted the land to their own purposes, and occupied it; and there was no doubt of its being intended by them to remain in the same situation, and not revert to its former occupiers. They have it, and are using it; even if they had had it for nothing, that makes no difference as to the rating; but, under the acts of parliament, they are in reality purchasers. The Attorney General addressed himself to the subject of the towing-path as that upon which the rate seemed least maintainable. But I think the company are occupiers of the path; the user by others is consistent with their occupation; and the reservation to the adjoining landowners of a right to come upon it would have been superfluous if the soil had not passed from them to the company. Other persons are excluded from using it, except for the navigation. I think, therefore, that the company were the rateable occupiers of all the land described in this rate.

COLERIDGE J. I concur in the opinions which have been given. The company are the occupiers of all that
is

is mentioned in the rate, and are therefore rateable. Much has been said on the question whether these parties are purchasers or not; and it is alleged that there is no conveyance: that, however, is immaterial; for the facts amount to a statutable conveyance. But the real question is, whether or not they are exclusive occupiers. Now, granting that the acts of user by them were ambiguous, they are at least evidence of an exclusive occupation: and, when we look from those acts to the statutes, an explanation is furnished. The company are authorised to take lands for the purposes of the navigation; and they have proceeded to the extent of taking them.

1840.

BRUCE
against
WILLIS.

Judgment for the defendants.

JAMES against PHELPS.

*Thursday,
January 23d.*

CASE for falsely, maliciously, and without probable cause, charging plaintiff before justices of the peace with the felonies after mentioned, and falsely, &c., causing plaintiff to be imprisoned until bailed by a judge's order, and falsely, &c., indicting plaintiff at the *Monmouthshire* assizes, *July 1837*, for that he, with others, feloniously, unlawfully, and maliciously did obstruct a certain airway of and belonging to a certain mine of defendant, by then and there feloniously, unlawfully, and maliciously building a certain wall across

In an action for a malicious prosecution, the question, whether there be or be not reasonable or probable cause, may be entirely for the Judge, or for the jury, according to the evidence in the particular case.

When the prosecution was under stat. 7 & 8 G. 4. c. 30.

s. 6., for maliciously and feloniously obstructing a mine, and plaintiff was acquitted on the ground that he committed the obstruction under a claim of right by his employer, and by such employer's direction, and, on action brought, it was proved, at the trial that there had been disputes between the employer and defendant on the subject, before the obstruction, and that defendant knew from plaintiff that the obstruction was effected in assertion of his employer's alleged right: Held, that the Judge was not justified in non-suiting, or directing a verdict for defendant, on the ground of want of reasonable or probable cause; but that the question was for the jury.

VOL. XI.

K k

the

1840.

 JAMES
 against
 PHELPS.

the said airway, and destroying a certain fire-place there situate, with intent thereby then and there to hinder and delay the working of the said mine, against the form of the statute, &c. (a); with a second count for the same obstruction, omitting the means; and a third count for feloniously, unlawfully, and maliciously obstructing a certain level of a certain mine by feloniously, unlawfully, and maliciously building a wall across the level, and destroying a fire-place there situate, with intent as before: which indictment defendant prosecuted until plaintiff, at the said assizes, was acquitted and discharged.

Plea, Not guilty.

On the trial before Gurney B., at the *Monmouthshire* Spring assizes, 1838, it appeared that the plaintiff, at the time of the act which was the subject of the prosecution, was in the employ of a person named *Protheroe*, between whom and the defendant there were disputes respecting two mines, in their respective occupations, lying close together. *Protheroe*, professedly with the view of asserting his supposed right against the defendant, directed the plaintiff to effect the obstructions complained of in the indictment; and the plaintiff accordingly made such obstructions, defendant having first had notice that plaintiff was to do so by *Protheroe's*

(a) Stat. 7 & 8 G. 4. c. 30. s. 6. enacts, "That if any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, every such offender shall be guilty of felony: " "provided always, that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working."

direction.

direction. For this the plaintiff was indicted, tried, and acquitted, as stated in the declaration, under the direction of Lord *Abinger* C. B. (a). The learned Judge, in the present case, was of opinion that the act done was within stat. 7 & 8 G. 4. c. 30. s. 6., and that, therefore, there was reasonable and probable cause for the prosecution; and he proposed to nonsuit the plaintiff; but, on the requisition of the plaintiff's counsel, he directed the jury to find a verdict for the defendant. In *Easter* term, 1838, *Talfourd* Serjt. obtained a rule for a new trial, on the ground of misdirection.

1840.

JAMES
against
PHELPS.

Ludlow Serjt. and *Talbot* now shewed cause. The plaintiff had to prove want of probable cause; in default of his doing so, it was incumbent on the Judge either to nonsuit or to direct a verdict for the defendant. There were no facts in dispute; and the question whether a given state of facts does or does not negative probable cause is for the Judge; *Blachford v. Dod* (b), *Davis v. Hardy* (c). In *McDonald v. Rooke* (d) it was held that a judge, if there be a mixed question of law and fact, may leave the question of probable cause to the jury. Here, as there were no facts in dispute, the only question is, whether the direction of *Gurney* B. was correct in law. The Lord Chief Baron in *Regina v. James* (a) seems to have assumed that the malice contemplated by stat. 7 & 8 G. 4. c. 30. s. 6. is malice in fact; but the statute here, as in other cases in the criminal law, points to that malice which is shewn by

(a) See the case, *Regina v. James*, 8 C. & P. 131.

(b) 2 B. & Ad. 179.

(c) 6 B. & C. 225.

(d) 2 New Ca. 217.

1840.

 JAMES
 against
 PHILIPS.

any act, knowingly and wilfully done, which is in itself illegal. *Malicious* is opposed to *accidental*; *Rex v. Philp* (a), *Rex v. Farrington* (b), are instances of this rule; the principle of those cases being that a party must be understood to contemplate the necessary consequences of his own acts. [Lord Denman C. J. A party has been convicted and executed for murder, who, intending only to commit arson, burnt a house, and, in so doing, killed a person in the house.] Here the necessary consequence of the obstruction was to delay the working of the mine. "When an act, which in its nature is criminal, has once been proved, the law frequently infers malice, and requires exculpatory proof from the party. Thus, in case of homicide, after proof that the prisoner killed the deceased, the law will presume malice, until the prisoner justify or extenuate the act;" 2 *Stark. Ev.* 686. (2d ed.). If it be said that here the act was not in itself criminal, the answer is that (although, there having been notice given, there was no risk of life being destroyed) the very act described in the statute, and declared felonious, was done intentionally and knowingly. Although there was a claim of right, the plaintiff unquestionably knew that the working of the mine would be stopped, and intended to produce that effect. There must be some limit to the doctrine that a claim of right negatives malice. A man cannot justify shooting another in the exercise or claim of a right to fire a gun. The statute here in question must be interpreted on the principle applied, in 2 *East, Pl. C.* 1062., to the statutes 6 G. 3.

(a) 1 *Moo. C. C. R.* 268. See the fourth point there.

(b) *Russ. & Ry. C. C. R.* 207.

c. 36. (a) and 6 G. 3. c. 48. (b). "The whole scope of those statutes, which were intended for the protection of the property itself from depredation, shews that the word *maliciously* is only to be taken in its most general signification, as denoting an unlawful and bad act, an act done *mallo animo* from an unjust desire of gain, or a careless indifference of mischief." In sect. 24 of stat. 7 & 8 G. 4. c. 30. there is a general enactment for punishing malicious injury to real or personal property; but a proviso is added, "that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of (c), nor to any trespass, not being wilful and malicious, committed in hunting," &c. There is no such proviso in sect. 6, which raises a strong inference that the legislature did not intend to except from the operation of sect. 6 acts done in the supposed exercise of a right. At any rate, the plaintiff having brought himself within the words of the statute, the defendant cannot be liable to an action for putting the matter in a course for trial. [Lord Denman C. J. Can you apply that reasoning where there are circumstances negating malice in the party prosecuted, within the knowledge of the prosecutor?] *Cohen v. Morgan* (d) seems to support such a proposition. In *Snow v. Allen* (e) it was held that an illegal act, even if done with notice of its illegality from the opposite party, does not render the doer liable if he acted under

1840.

 JAMES
against
PHELPS.

(a) "For encouraging the cultivation, and for the better preservation, of trees, roots, plants, and shrubs."

(b) "For the better preservation of timber trees, and of woods and underwoods; and for the further preservation of roots, shrubs, and plants."

(c) See, as to this proviso, *Regina v. Dodson*, 9 A. & E. 704.

(d) 6 D. & R. 8.

(e) 1 Stark. N. P. C. 502.

1840.

 JAMES
 against
 PHELPS.

a mistake of law only. In *Ravenga v. Mackintosh* (a), where the defendant had acted under legal advice which turned out to be erroneous, there was evidence that he had not acted bonâ fide on that advice, nor believed that he had a cause of action; and that evidence was left to the jury. Here no facts were in dispute.

Talfourd Serjt., contrâ, was stopped by the Court.

Lord DENMAN C. J. It certainly appeared to me that it would be sufficient for us, in this case, to declare our opinion that the learned Judge, supposing the question to have been one entirely of law and for him only, had not taken a correct view of the law. But the course which has been taken in argument renders it necessary for us to go further. Malice is a question which must go to the jury. The question, whether there be or be not reasonable or probable cause, may be for the jury or not, according to the particular circumstances of the case. *Blachford v. Dod* (b) was a case where the judge was justified in nonsuiting the plaintiff, the facts, as proved, constituting a reasonable and probable cause. But can a party be said to have a reasonable and probable cause, even where there is a primâ facie case of felony, if he knows of facts negating the malice? The Judge should not have prevented the jury from enquiring into the question. As to stat. 7 & 8 G. 4. c. 36. s. 24., I think it makes strongly against the argument of the defendant's counsel. That section gives a power to convict summarily for malicious mischief; and it con-

(a) 2 B. & C. 693.

(b) 2 B. & Ad. 179.

tains a proviso that, where there is a bonâ fide acting under a supposed right, the party acting shall not be liable to conviction even for the trespass. Now, why was there no such provision in the case of felony? For this plain reason, that the principles of the common law prevent the act from being felonious where there is no malice in the intention. I am glad that the learned Judge who tried the cause authorises us to say that he now assents to our view.

1840.

 JAMES
against
PHELPS.

LITLEDALE and WILLIAMS Js. concurred.

COLERIDGE J. In *Delegal v. Highley* (a) the Court of Common Pleas held that the reasonable and probable cause must be that which exists in the mind of the party at the time of the act in question. I think that the acquittal, under the direction of Lord Abinger, was right. Then did the defendant in this action know of the facts upon which the acquittal proceeded? If he did, he had no reasonable or probable cause for the prosecution.

Rule absolute.

(a) 3 New Ca. 950.

1840.

Friday,
January 24th.

**HOLDSWORTH against The Mayor, Aldermen,
and Burgesses of the Borough of CLIFTON
DARTMOUTH HARDNESS, in DEVONSHIRE.**

In an action of
debt against a
corporation re-
gulated by stat.
5 & 6 W. 4.

c. 76., on a
bond given by
them to plain-
tiff for payment
of 1249*l.*, it
appeared, on
special verdict,
that, before
the passing of
the act, plain-
tiff being an
alderman of
the borough,
quo warranto
informations
were filed
against him
and several of
his friends and
relations, to try
their right to
be members of
the corporation,
and they were
ultimately
ousted; that
plaintiff, with-
out authority
from the now
defendants,
caused the in-
formations to be defended; and that, before the passing of the act, certain members of the corporation, then being the governing body, and having the custody of the common seal, and lawful power to affix it to instruments, did, on plaintiff's application, affix the seal to the said bond, and deliver it to him by way of reimbursement of the costs of such defences, and for no other consideration; that divers of the then burgesses of the corporation had no notice of the bond being given for that cause; and that the sealing and delivery thereof was without fraud, unless the sealing and delivery for the cause aforesaid was a fraud in law upon defendants, or the inhabitants, or the members of the corporation who did not concur.

Held that, on the facts found, the corporation were liable on the bond before stat. 5 & 6 W. 4. c. 76.

That the corporation, as subsisting under the statute, were still liable.

And that the liability was a "lawful debt," chargeable on the borough fund, within sect. 92.
affairs

DEBT on a bond, which appeared on oyer to bear date *May 22d*, 1833, and to be conditioned for payment of 1249*l.* by the mayor, bailiffs, and burgesses of *Clifton Dartmouth Hardness*, to the plaintiff, his executors, &c. Pleas. 1. That the bond was obtained by defendants from plaintiff by fraud, covin, and misrepresentation. Verification. 2. That, before and at the time of the making of the said writing, &c., and from thence until the passing of stat. 5 & 6 W. 4. c. 76., defendants were one body corporate &c., by the name &c., and that, since the passing of the statute, viz. &c., they have been and still are one body corporate, by the name &c. And that, before the passing &c., and before the filing of the informations &c. and the making of the bond, viz. on &c., plaintiff was a member of the said corporation, to wit an alderman thereof, and claimed to have and exercise, and did in fact have and exercise, great influence in the corporation and on the individual members thereof, and in the management of the

affairs of the corporation, and in the election of members of parliament for the borough. That, before the passing &c. and the filing and the making of the bond, viz. &c., certain relations and friends of plaintiff, viz. &c., and a servant of plaintiff, viz. &c., respectively claimed to be and acted as members of the corporation. That afterwards, and before the passing &c., viz. &c., divers to wit fourteen informations in the nature of a quo warranto were filed and exhibited in *K. B.* against plaintiff and the other persons last mentioned, to try their respective titles to be members of the corporation; and such proceedings were thereupon had, that afterwards, viz. in *Michaelmas* term, 1830, judgment on the said informations was duly had against them in the said Court. And that, whilst the said informations respectively were pending in the said Court, plaintiff then being a member of the said corporation, to wit an alderman thereof, and whilst he claimed to have and exercise, and continued to have and exercise, great influence &c. (as above), viz. on 21st *June* A. D. 1830 aforesaid, he the said plaintiff, without any order, authority, or direction of or from defendants, caused the said several informations respectively to be defended, and the supposed rights and titles to the various offices claimed and exercised by himself and the other persons before named to be supported, and in so doing incurred and paid divers costs and charges, to wit to the amount of the money mentioned in the condition of the said writing &c., in and about the said defence. And that afterwards, viz. *May* 16th, 1833, plaintiff, to reimburse himself the said costs &c., and for no other cause or consideration, wrongfully and unjustly induced and prevailed on certain persons, viz. &c.

1840.

HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

1840.

—
HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

&c., then being members of the corporation, to affix and cause to be affixed the common seal of the corporation to the writing in the declaration mentioned, and they did then affix &c. at the request and inducement of plaintiff, and then delivered the said writing to him, for the cause aforesaid, and for no other cause or consideration whatsoever. And that the 1249th in the condition mentioned was the sum incurred and paid by plaintiff for costs &c. as aforesaid; and that the common seal was affixed &c., and the bond delivered to plaintiff, for the cause aforesaid, and not for any other debt or sum due from defendants to plaintiff, nor was there ever any valuable consideration, or value, or cause, or matter or thing whatsoever, for the sealing or delivery &c. And that the sealing and delivery &c. for the cause aforesaid was a fraud upon defendants and the inhabitants of the said borough, and upon the members of the said corporation who did not join or concur in the wrongful sealing and delivery of the said writing as aforesaid: And so the said defendants say that the said writing in the said declaration mentioned was, and is, wholly void in law. Verification. 3. Stating charters of *Edward III.* and *James I.*, and a by-law made according to such charters (and still in force), to prohibit the granting of leases or revenues &c. without such authority as was therein mentioned. Averments like the former ones as to the occasion of making the bond; and that (plaintiff then being recorder) the mayor and certain aldermen of the borough, then having the common seal in their custody or power, caused it to be affixed to the bond; and that the persons who so caused &c. were not, nor was any &c., authorised by defendants, or by any charter, by-law, or authority of or from
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the corporation or otherwise, to cause &c., or to bind the corporation thereby: and that the said persons caused the said writing so sealed to be, and the same was, delivered to plaintiff (he then having notice of the premises) without any authority from defendants or otherwise as aforesaid so to do &c.: and that the bond was executed for securing the costs &c., and not otherwise; and that the seal was affixed and the bond delivered for the cause and in manner aforesaid, and not otherwise. Verification.

Replication. To plea 1. That the bond was obtained fairly, and not by fraud &c., in manner &c. To plea 2, That the bond was obtained fairly and without the cause and fraud in the second plea alleged, in manner &c. To plea 3. That the bond was executed and delivered to plaintiff with the authority of defendants, and not for the cause, and in manner, and without authority, as in the last plea alleged, in manner &c. Conclusions to the country. Issues thereon.

At the assizes for *Devon*, a special verdict was found, as follows. On the first issue, that the bond was obtained fairly &c., in manner &c. On the second issue, that defendants were and are a body corporate (as alleged in the second plea); and that before the passing of the act, filing of the informations, and making of the bond, viz. &c., plaintiff was a member of the corporation, viz. an alderman thereof, and had and exercised great influence in the said corporation, and in the management of the affairs and business thereof, and in the election of members of parliament for the said borough. And that afterwards and before the passing of the said act, and before the making of the writing &c., viz. in *Trinity* term 1830, the several informations in the second plea mentioned were filed against the persons

1840.

HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

1840.

—
HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

sons named, being relations and friends of plaintiff, and for the purpose in that plea mentioned; and thereupon such proceedings were had, and such judgments of ouster duly had and obtained upon the said informations against the said several parties, as in the second plea is alleged: and that, whilst the said informations respectively were pending, plaintiff, then being a member &c., to wit an alderman &c., to wit on 21st *June* 1830, without any order, authority, or direction of or from defendants, caused the said several informations respectively to be defended, and the supposed rights and titles to the various offices claimed and exercised by himself and the said several other persons in the second plea named to be supported; and in so doing incurred and paid, before the making &c., costs, to wit to the amount mentioned in the condition &c., in and about the said defence: and that plaintiff afterwards, on 16th *May* 1833, and before the passing &c., applied to the persons in the said plea in that behalf mentioned, then being members of the said corporation and being the governing body thereof, to pay him such costs and charges &c.; and the last mentioned persons, then being the governing body of the said corporation, and having the custody of and lawful power to affix the corporate seal to instruments, did affix the corporation seal to the said writing &c., and delivered the same to plaintiff by way of reimbursement of the said costs and charges, and for no other cause or consideration whatsoever: and that the said 1249*l.* mentioned in the condition &c. was the sum incurred and paid by plaintiff for costs &c. in defending &c. as aforesaid, and not otherwise: and that the common seal of the said corporation was affixed to the said bond, and the same was delivered to plaintiff for the cause aforesaid,

said, and not for any debt or sum due or owing from defendants to plaintiff, nor was there ever any valuable consideration or value or cause &c. for the sealing and delivery of the said writing to plaintiff, save as aforesaid: and that there were divers burgesses of the corporation, at the time when the said writing was so sealed as aforesaid, who had no notice or knowledge of the giving of the said bond for the cause aforesaid: and that the said writing was sealed and delivered to plaintiff, in manner aforesaid, without any fraud, unless the sealing and delivery of the said writing for the cause aforesaid was a fraud in law upon the defendants, or inhabitants of the said borough, or upon the members of the said corporation who did not join or concur in the sealing of the said writing in manner aforesaid. But whether or not, upon the whole matter so found, the sealing and delivery &c., for the cause aforesaid, was a fraud in law as aforesaid, and whether the said writing was therefore, and is, wholly void in law, the jurors &c. As to the third issue, the finding was that the said writing was executed and delivered to plaintiff with the authority of defendants, and not for the cause and in manner, and without authority, as in the last plea is alleged, in manner &c. And if upon the whole matter the Court should be of opinion that the plaintiff was entitled to recover the debt &c., the jury assessed the damages &c.

1840.

HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

Erle for the plaintiff. The question is, whether the circumstances pleaded are equivalent to fraud in the obligee. The defendants say that this is a bond given voluntarily and not for value, but for advances which the plaintiff was not bound to make, and which, therefore, the corporation might have refused to replace.

In

1840.
 ———
HOLDSWORTH
 against
 The
Mayor &c. of
DARTMOUTH.

In ordinary cases, want of valuable consideration does not impeach a bond; and there is no legal distinction between a corporation and a private obligor. Particular restraining statutes which have been passed confirm the general rule. The disposing power which corporations have over their property, where no statute intervenes, is shewn by Lord *Coke* in several instances; *Co. Litt.* 44 a., 300 b.; and authorities on the same point are given in *Com. Dig. Franchises*, (F 11.), (F 18.). In *Rex v. Watson* (a), where the corporation had voted a sum of money to the mayor in consequence of his having incurred expense by certain legal proceedings, and a rule nisi was obtained for a criminal information against some of the members, *Ashhurst J.* said, “If the only charge alleged against the defendants were the mis-spending of the corporation money, I should have been of opinion that the information ought not to be granted, because this is not the Court in which redress could be given in such a case, but application should be made to the Court of Chancery.” And in *The Mayor and Commonalty of Colchester v. Lowten* (b) Lord *Eldon C.*, referring to this judgment of *Ashhurst J.*, fully recognised the authority and the practice of corporations, not holding for charitable purposes, to alienate their funds, and appeared to be of opinion that, where such an alienation had been duly carried into effect, the Court of Chancery ought not to interfere.

Such being the law independently of any statute, does the Municipal Corporation Act, 5 & 6 W. 4. c. 76., render this bond invalid? Sect. 92 directs the application of the borough fund in future, “subject” expressly “to the payment of any lawful debt due from such body

(a) 2 T. R. 199.

(b) 1 Ves. & B. 226. See p. 244—246.

corporate to any person, which shall have been contracted before the passing of this act, and unredeemed:" and the validity of such debts is impliedly recognised by the proviso at the end of that section, which is intended only to prevent the creditor from acquiring any additional remedy by the preceding enactment. Sects. 94 and 97 also shew the intention of the legislature to leave untouched all bonâ fide contracts made by the corporation before *June 5th, 1835*. In the *Attorney-General v. The Mayor of Norwich* (a) application was made to the Court of Chancery to restrain members of that corporation from ordering payment out of the borough fund of costs incurred, under resolutions of the council, in petitioning for an appointment of charity trustees, and in defending *quo warranto* informations against the mayor and an alderman, which payment, it was alleged, would be contrary to stat. 5 & 6 *W. 4. c. 76. s. 92*. But Lord *Cottenham* C. said: "Unless I can come to the conclusion that under no possible circumstances it would be proper for the trustees to pay the expenses of the charity petition out of the corporate funds, or to make payments out of those funds for any expenses incident to the opposition to *quo warranto* informations contesting the corporate character of members of the corporation, nothing stated in this information calls for any judgment from me on the questions which have been discussed upon the construction of the act of parliament" (b).

The statute, therefore, does not affect this bond, if it was originally one to which the corporation seal might lawfully be affixed; and it was so, on principles

1840.

HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

(a) 2 *Mylne & C.* 406.

(b) Page 423.

1840.

HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

of common law, recognised by the authorities first cited ; consequently, the defendants cannot now allege that it was given without valuable consideration.

Sir *W. W. Follett*, contra. This bond was given by way of reimbursement for costs incurred in defending the quo warranto informations, and, as the special verdict states, "for no other cause or consideration whatsoever." The decision in the *Attorney-General v. The Mayor of Norwich* (a) turned entirely on the state of the pleadings, which did not allege specifically enough the matter of complaint. The party applying was bound to shew that there were no circumstances which could justify the appropriation of the funds ; if any could be supposed consistently with the statements in his information, he failed. Here it cannot be suggested that the body corporate had any interest in defending the quo warrantos. It would be difficult to say how, since stat. 5 & 6 W. 4. c. 76., the plaintiff in an action like this can obtain satisfaction out of the borough property. By sect. 92 the borough fund, there described, is appropriated to public purposes, subject, among other things, "to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this act." The intention was to prevent injury to persons having bonâ fide claims on the corporations : this bond is executed, not to pay a debt, for the verdict finds that there was none, but to give a sum of money to a particular member of the corporation. If the borough fund is not sufficient for the purposes mentioned in sect. 92, the required amount must,

(a) 2 *Myline & C.* 406.

according

according to that section, be levied by a rate on the inhabitants. But it is provided that nothing in the act contained shall "authorise the levy of any rate within any part of the borough for the purpose of paying any debt contracted before the passing of this act which before the passing of this act could not lawfully be levied therein towards the payment of the same;" and the discharge of this bond is not a purpose for which a rate could have been levied before the act. As to the estate which the corporation had on the passing of the act; in *The Attorney-General v. Aspinall* (a) Lord Cottenham C. said: "In my opinion, the 92nd section did not require the aid of the others, and particularly of the 97th section; but, taking them all together, I cannot doubt that a clear trust was created, by this act, for public, and therefore, in the legal sense of the term, charitable purposes, of all the property belonging to the corporation at the time of the passing of the act; and that the corporation in its former state, holding, as it did, the corporate property until the election of the new council and treasurer, were in the situation of trustees for these purposes, subject to the restrictions specifically imposed by the act, and subject to the general obligations and duties of persons in whom such property is vested" (b). And in *Regina v. The Mayor &c. of Liverpool* (c) corporation funds were treated as property held, since stat. 5 & 6 W. 4. c. 76., in trust for the public. Therefore, if the plaintiff in an action like this could recover, he must have execution against a trust fund. Sect. 68, by which certain pensions and allowances are protected,

1840.

HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

(a) 2 *Mylne* & C. 613.

(b) P. 622.

(c) 9 *A. & E.* 435.

1840.
 ———
 HOLDSWORTH
 against
 The
 Mayor &c. of
 DARTMOUTH.

shews that the act does not leave every voluntary grant untouched. But the argument for the plaintiff must go the length of supposing that, if the old corporation have given a bond, without any consideration, to one of their own body, such a contract exists as sect. 92 was intended to protect. The whole question turns on the meaning of the words "any lawful debt." No authority is given to support the right of action here claimed, except the doctrines stated in *Rex v. Watson* (a) and *The Mayor and Commonalty of Colchester v. Lowten* (b); and in those cases it was not questioned that the corporation did in truth hold the property for the public benefit; the impracticability of restraining their grants arose from the difficulty of saying for whom they could be considered trustees. But, whatever may have been their power at common law to alien, it does not follow that debts contracted by them before the act shall not now be questioned. Here it is found that certain persons, "being the governing body of the said corporation, and having the custody of and lawful power to affix the corporate seal to instruments," affixed the seal to the bond declared upon; but that may be a fraud upon the corporation. [Littledale J. What is meant by the "governing body?"] There is no body recognised as such at common law: in the absence of any peculiar regulation, the whole body of corporators convened for the transaction of business acts as the common council; per Buller J. in *Rex v. Knight* (c); *Willcock on Corporations*, p. 296, s. 764. Here, it appears that there was a governing body authorised to seal instruments; but, assuming that they might therefore alien or contract to alien the corporation

(a) 2 T. R. 199.

(b) 1 Ves. & B. 226.

(c) 4 T. R. 419. 431.

property before the statute, and that if the money had been then paid the transaction might have been unimpeachable, it does not follow that the bond can now be enforced, if there never was a "lawful debt" within the statute.

1840.

HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

Erle in reply. In *Smith v. Barrett* (a) it was resolved by all the Court that at this day a corporation of mayor and commonalty, or of bailiffs, burgesses, &c., may by their common seal grant their lands &c. for life or years or in fee, and this shall be good, and shall bind all their successors. Then the former corporation of *Dartmouth* might bind their goods (or subject their lands to an elegit) by giving this security. Want of consideration cannot be alleged here, as in an action of *assumpsit*; and the plaintiff may have given up the power of proving consideration, on receipt of this very security. A similar suggestion was made by the Lord Chancellor in *The Mayor and Commonalty of Colchester v. Lowten* (b). The general doctrine laid down in *The Attorney-General v. Aspinall* (c) and *Regina v. The Mayor &c. of Liverpool* (d) is not disputed; but the corporation is a continuing body with regard to the fulfilling of engagements; and the plaintiff is entitled to his remedy against the property of those who have contracted with him. If any difficulty arises on the provisions respecting a borough rate, it is sufficient to answer that the verdict does not shew any want of funds independent of a borough rate.

(a) 1 Sid. 161.

(b) 1 Ves. & B. 226. 243.

(c) 2 Mylne & C. 613.

(d) 9 A. & E. 435.

1840.
 ———
 HOLDSWORTH
 against
 The
 Mayor &c. of
 DARTMOUTH.

Lord DENMAN C. J., after stating the material facts, proceeded as follows. The first question is, whether, if stat. 5 & 6 W. 4. c. 76. had not passed, this bond would have bound the corporation; and on that point I cannot entertain a doubt. Even if the plaintiff had been the only member whose title was disputed, it is possible that the defence might justifiably have been ordered at the general expense; for the rights of the corporation might have depended on the result: and, if they had instructed him to defend under such circumstances, the bond would have been given for a proper consideration. I have no doubt, therefore, that it was binding before the act. But, secondly, it is said that under stat. 5 & 6 W. 4. c. 76. s. 92., which subjects the borough fund to "payment of any lawful debt," the consideration must be more strictly looked at. The same question, however, arises, as before; would a debt, contracted under the circumstances which have been mentioned, be a lawful debt? If any thing like fraud were shewn, it would not: that was the defence, but it is negatived by the verdict. The transaction here has been ingeniously put upon the footing of an agreement to alien corporation property, the statute intervening before the alienation was complete; but there the debt anterior to the statute would be only the claim to future execution of an agreement, which, though it might be lawful when made, could not perhaps be lawfully put in execution after the statute passed. Here everything was done before the passing of the act, and must be taken to have been done on good consideration: the setting of the seal shews that all was done lawfully. The *Norwich* and *Liverpool* cases (a),

(a) *The Attorney-General v. The Mayor of Norwich*, 2 Mylne & C. 406.; *Regina v. The Mayor &c. of Liverpool*, 9 A. & E. 435.

and

and *The Attorney-General v. Aspinall* (a), and the suggested difficulty as to the levying of rates, do not relieve the corporation from the payment of just and lawful debts; and there is nothing to shew that this was not such a debt.

1840.

HOLDSWORTH
against
The
Mayor &c. of
DARTMOUTH.

LITLEDALE J. First, as to the case as it stood before the act. We are at liberty to suppose the quo warrantos brought under such circumstances that the existence and welfare of the corporation might depend on their result. If the corporation had no funds for the defence, it might be meritorious to give this bond. Cases may be supposed in which the litigation regarded only some partial dispute, not affecting the welfare of the corporation; but, *primâ facie*, it must be taken that the bond was given for the general benefit. If there had been any fraud cognizable at law, the case would have been different; but that is negatived: and, if there had been abuse, though short of such fraud, it might have been complained of in equity; but no such case is made out. According, therefore, to the authorities, it appears that, before the statute, such a bond might lawfully be given. Then, since the statute, the borough fund is subject to "payment of any lawful debt;" and an obligation by bond is such a debt, within the letter of the clause. It is said not to have been such a lawful debt as the statute contemplated; but, if it is a lawful debt at all, the clause applies: it may have been improvidently incurred, but still it is a debt. The plaintiff, therefore, is entitled to judgment.

(a) 2 *Mylne* & C. 613.

1840.

HOLDSWORTH
 against
 The
Mayor &c. of
DARTMOUTH.

WILLIAMS J. The instrument declared upon, being in the shape of a bond, implies consideration, unless there be something which prevents the ordinary rule on this subject from taking effect. But fraud is negatived. And, as to the manner of affixing the seal, when we are told, on special verdict, that persons who are the governing body of the corporation, and have lawful power to affix the seal, have done so, we must suppose the jury to have found, on sufficient proof, that the bond was executed with proper authority. The bond, then, being valid in itself, executed by lawful authority, and implying consideration, constitutes a lawful debt. The borough fund may be insufficient to defray it without a rate; but that might be so if the debt were, *ex concessis*, the most just, and founded on the most ample consideration; and it cannot be intended by the statute that the new corporation fund should be inapplicable even to a debt of that nature.

COLERIDGE J. This is a very clear case. If the late act did not intervene, it is hardly disputed that the bond would import consideration, in the absence of fraud. But the action would then be maintainable on the ground that a lawful debt was subsisting; and, where that is so, the borough fund is now chargeable, under sect. 92: the action rests on the same ground. The objection, that a borough rate may be necessary, has been answered by my brother *Williams*; however just the debt might be, the same argument would apply. And the difficulty is one which we have nothing to do with. They may have assets without a rate; if not, and if the law prevents a rate being imposed, that course will not be resorted to.

Judgment for the plaintiff.

1840.

The QUEEN *against* SLATTER.Wednesday,
January 29th.

SIR W. W. FOLLETT had obtained a rule, in this term, for an information in the nature of a quo warranto, calling on the defendant to shew by what authority he claimed to be a councillor of the city and borough of *Oxford*.

The affidavits in support of the rule stated that, at the election in *November* 1839, the defendant was a candidate for the office of councillor for the west ward of the city and borough; and that the presiding alderman declared him and another duly elected to serve as councillors for the said west ward. Statements were added for the purpose of shewing that the defendant was not legally elected; and the relator's affidavit stated that the motion was made at the instance of the "deponent, as relator against the said *James William Slatter*, who has accepted the said office of town councillor."

Under stat. 5 & 6 W. 4. c. 76. the Court will not grant a quo warranto information unless it be shewn that the party is in office de facto; and, for this purpose, it is not enough if the affidavit states simply that he has "accepted the office," without specifying the mode of acceptance. Although it be sworn that the presiding alderman has declared the party duly elected.

Erle now shewed cause. The information cannot go, because it does not appear that *Slatter* is in office de facto. He is not shewn to have made the declaration required by sect. 50 of stat. 4 & 5 W. 4. c. 76., which seems to answer to the swearing in under the ancient system (a). User, in some way or other, must be shewn; *Rex v. Whitwell* (b), *Rex v. Ponsonby* (c), *Regina v. Pepper* (d). The declaration of the alderman does not put

(a) See *Regina v. Humphery*, 10 A. & E. 335.

(b) 5 T. R. 85.

(c) *Sayer's Rep.* 245. And see 4 East, 339.

(d) 7 A. & E. 745.

1840.

The QUEEN
against
SLATTER.

the party into office; nor is it enough to say, in general terms, that he "has accepted:" the facts should be shewn, upon which the Court may see whether that has taken place which amounts in law to an acceptance.

The Court then called on

Sir *W. W. Follett*, contra. The affidavit states that *Slatter* has accepted the office: it is not necessary that he should have exercised it. Under the old law, it was held enough to state an admittance, and a swearing and inrollment, in those terms, upon information and belief; *Rex v. Harwood* (a). Here the affidavit is positive. No requisite for vesting the office de facto in the party can be suggested which goes beyond "acceptance." It is said that the nature of the act of acceptance ought to be specified: but, according to this argument, even an allegation that the party had acted as councillor would not be sufficient, unless all the particular circumstances of the act were detailed; and, if an admittance were insisted on and alleged, the ceremony of the admittance must be set forth. [*Coleridge J.* Would the allegation here be supported by shewing that *Slatter* had told a friend, whom he happened to meet, that he had accepted the office?] In sect. 51 the enactment is, that the party elected shall "accept," or pay a fine. [*Littledale J.* Whether he does accept or not will be a legal inference from certain facts (b).] Here an indictment

(a) 2 *East*, 177.

(b) Lord *Denman C. J.* mentioned that, in a case of *Regina v. Harrison*, argued in last term, it had been assumed by the Court, on the authority of *Rex v. Whitwell* (5 *T. R.* 85.), that something beyond a mere allegation of acceptance was necessary. *Cresswell*, amicus curiæ. There the party was sworn in, and that fact was insisted upon in argument.

The motion in *Regina v. Harrison* was for a quo warranto information for

ment for perjury might be sustained on the allegation, if false: so that the case is stronger than *Rex v. Harwood* (a). If an action were brought for a penalty for acting without qualification, the averment of "acceptance" would be enough. A mere claim, indeed, would be insufficient. [Coleridge J. In a record, an allegation is construed according to its technical meaning: but can you apply that to an affidavit? We want to see whether the deponent knew what the word means. Lord Denman C. J. Suppose a candidate came forward publicly, and thanked his supporters, but afterwards withdrew, on finding that several of his votes were bad.] His so coming forward would shew a *primâ facie* acceptance; the withdrawal might be shewn in answer. [Coleridge J. Can you recollect any instance in which it is sufficient to use, in an affidavit, a term which has a colloquial as well as a technical meaning?]

1840.

—
The QUEEN
against
SLATTER.

Lord DENMAN C. J. Perhaps every word cannot be interpreted by the same rules. Thus, take the two words "acting" and "admitting." "Acting" may be used merely to shew how the deponent understands the effect of what has been done; "admitting" is altogether a technical expression. The "acceptance" of a charter

for exercising the office of a freeman of the borough of Lancaster. Cause was shewn, November 21st, 1839, by *W. H. Watson*, who cited the above case of *Rex v. Whitwell* (5 T. R. 85.). Coleridge J. asked if the party now claiming had been sworn in; and, being answered in the affirmative, observed that a swearing in, though defective, had been held sufficient ground, as to user, for a quo warranto information. (See *Rex v. Tate*, 4 East, 337.). Cresswell supported the rule; and, after discussion of another point, on which *Rex v. Barzey* (4 M. & S. 253.) was cited, and distinguished from this case, Lord Denman C. J. said that the rule must be absolute. *Patterson*, *Williams*, and Coleridge Js. concurred.

(a) 2 East, 177.

might

1840.

—
The QUEEN
against
SLATTER.

might perhaps have only a technical meaning : but whether particular acts constituted, or not, an "acceptance" of office may be mere matter of opinion, so far as the deponent is concerned. The rule must therefore be discharged.

LITLEDALE J. I am of the same opinion. The word here used is, indeed, that which we find in the statute ; but the act done is merely sworn to in general terms.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged (a).

(a) See the next case.

(The following case, decided in *Michaelmas* term 1840, may conveniently be added here.)

[Thursday,
November 12th,
1840.]

The QUEEN against QUAYLE.

An information, in the nature of a quo warranto will be granted against a party for claiming to be a councillor of a borough, on affidavit that he has taken

upon himself the office, and acted in that capacity, and has been seen present at meetings of the council, acting as a councillor, though the nature of the acceptance or acting be not further specified, and though it be not stated that he has made the declaration under sect. 50 of stat. 5 & 6 W. 4. c. 76.

On motion for such information, the election of the councillor being impeached by objections to his voters, on the grounds of personation, and that some have no title to be on the burgess roll, it is no answer in shewing cause, that, upon defendant's affidavit, enough of the opposite party's voters are bad to reduce his poll below that of the defendant. Though the objections in the latter case be founded on a comparison of the voting papers with the burgess roll, both verified by affidavit, the alleged objections appearing on the face of the voting papers. For the Court will not hold parties disqualified on affidavits which there is no opportunity to contradict.

An inhabitant of a borough may be a relator, on application as above, though he is not a burgess.

at

at the supposed election of defendant, had the majority of legal votes.

The affidavits in support of the rule stated that, at the election on 1st *November* 1839, the votes for the defendant and *Shand* appeared to be equal; that the presiding alderman and assessors thereupon declared the defendant duly elected; that the defendant had "taken upon himself the office of a councillor" of the borough, and had "acted in that capacity," and that he had been seen present at the meetings of the council, and "acting as a councillor." The affidavits contained statements to show that some of the votes taken for the defendant were not really given by the voters in whose names they were tendered: that a vote for *Shand* was improperly rejected; and that a voter for the defendant was improperly on the burgess roll. The affidavits in answer contained statements supporting the rejection of the vote for *Shand*, and showing that a number of the voters for *Shand*, including *Shand* himself, the relator (who, however, appeared to be an inhabitant), were improperly on the burgess roll; and that votes, which were received for him, were given in on voting papers which were informal from misdescription or non-description. Copies of the voting papers were verified by affidavits. There were also verified extracts from the burgess roll, shewing an inconsistency between the descriptions of some of *Shand's* voters in the burgess roll and in the voting papers.

According to these affidavits, and admitting the objections raised by the relator, the defendant had a majority, if the burgess roll were opened on both sides, or if it were held conclusive on both sides. But, if the votes
were

1840.

The QUEEN
against
QUAYLE.

1840.
 The QUEEN
 against
 QUAYLE.

were not disallowed in the cases where the defendant alleged that the voting papers were bad, then the relator, on the assumption that his objections were correct, had a majority without the rejected vote.

Sir *J. Campbell*, Attorney General, and *Crompton* now shewed cause. First, the affidavits do not shew any exercise of the office by the defendant, on which the Court can proceed. It is not deposed that he has made the declaration under sect. 50 of stat. 5 & 6 *W.* 4. c. 76., but only, in general terms, that he took upon himself the office of councillor, and acted as such. The nature of the acceptance and the acts performed should be shewn; the Court will not allow this to be left to the judgment of the deponent; *Regina v. Slatter (a)*. Then, further, the burgess roll cannot be opened for the purpose of contesting the election of a councillor. Such a course would be inconvenient: and the safest rule is, that the title of the burgesses may be questioned immediately, but not collaterally. If, however, the roll be impugned, the affidavits in answer shew that the defendant has a majority. Or, excluding the objections to voters on the burgess roll, the cases of misdescription and non-description reduce the relator's poll to a minority; and of these the Court can judge, as copies of the documents are before these. Further, *Shand* is not a proper relator, as he himself has no right to be on the burgess roll.

Kelly and *G. Henderson*, contrà, were stopped by the Court.

(a) *Antè*, p. 505.

LORD DENMAN C. J. I feel no doubt, as at present advised; and, unless the rest of the Court (a) should differ from us, we need not call on the counsel in support of the rule. There is a difference between accepting and acting; and, if the party against whom the quo warranto is demanded has acted, it is immaterial whether he has accepted or not. I think the decision in *Regina v. Slatter* (b) was correct. But there the deponent relied upon the statute, and shewed only that, upon his construction of it, the defendant had brought himself within its terms by accepting office. That we did not consider sufficient, without seeing what the acceptance was. But here it appears that the defendant has acted as a councillor, which is a clear intrusion. As to opening the burgess roll, the inconvenience may be very great; but it may well be doubted whether there would not be more mischief caused by our refusing to do so. Then it is said that, although a *prima facie* case be made against the defendant by objections to parties on the roll, an answer is furnished by shewing that a greater number of the other candidate's voters are objectionable on the same ground. But I will not consent to disqualify a man who has not been objected to on any occasion when he had an opportunity of answering the objection. Such objections are no answer to a motion for a quo warranto. Nor can we now act upon the objections which the defendant makes to the voting papers; for the parties interested have had no opportunity of answering these objections. And though the allegations may be supported by documents, we cannot forget that such documents are too often in the hands of par-

1840.

THE QUEEN
against
QUAYLE.

(a) *Littledale* and *Coleridge* Js. were absent.(b) *Ante*, p. 505.

tisans.

1840. tisans. As to the relator, we have before now taken for granted that any inhabitant may be a relator (*a*).

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The QUEEN
against
QUAYLE.

WILLIAMS J. This is not like a case where affidavits are produced denying the truth of the facts on which the rule is obtained. We cannot abide by the oath of the party who swears last, as to facts which he is the first to bring forward.

Lord DENMAN C. J., in the same term (*November 32d*), stated that the rest of the Court agreed in the above decision.

Rule absolute (*b*).

(*a*) *Rex v. Parry*, 6 *A. & E.* 810. See pp. 815, 818.

(*b*) See the next case.

(The following case, decided in *Hilary* term 1841, may conveniently be added here).

[*Saturday*,
January 30th,
1841.]

The QUEEN against The Mayor, Aldermen, and Burgesses of the Borough of LEEDS.

On an election of councillors for a ward in a borough, the presiding alderman, and two assessors, before two in the after-

noon of the next day but one after the election, published (under stat. 5 & 6 *W.* 4. c. 76. s. 35.) a declaration containing a list of the councillors elected, which declaration included the name of *P.* After two o'clock, the alderman and assessors, on the discovery of a supposed error in counting the legal votes, signed and published a second list, omitting the name of *P.* and substituting that of *R.* *P.* afterwards made the declarations required by stats. 9 *G.* 4. c. 17. s. 2. and 5 & 6 *W.* 4. c. 76. s. 50.; and *R.* subsequently did the same. Afterwards, upon *P.* claiming to act, the mayor and town council refused to permit him to do so, and allowed *R.* to act.

On application by *P.* for a mandamus to receive and count his vote: Held, that the office was not full of *R.*; and that the proper remedy was by mandamus; the second publication and subsequent acting by and on behalf of *R.* being merely void, and *P.* being in de facto.

count

count the vote of *Radford Potts*, at the corporate meetings of the council of the borough, the said *R. P.* having been duly elected a councillor for *Mill Hill* ward in the said borough, and having duly qualified, and accepted the said office of councillor; and to permit him in other respects to exercise the office of councillor.

1841.

The QUEEN
against
The
Mayor &c. of
LEEDS.

The affidavits in support of the rule were to the following effect. An election of two councillors for *Mill Hill* ward took place on 2d *November* 1840, and *John Howard*, *Radford Potts*, *Peter Fairbairn*, and *Joseph Richardson*, were candidates. The number of votes given was, for *Howard* 241, *Potts* 238, *Richardson* 217, *Fairbairn* 215. On 4th *November*, the alderman and assessors rejected a certain number of voting papers; and, after counting the remainder, declared *Howard* and *Potts* duly elected, and signed a declaration or list to that effect, which was also signed by the mayor, and posted by the town clerk on the court-house door. The deponents were informed and believed that, about nine in the evening of 4th *November*, and after the above mentioned publication of the declaration, the alderman and one of the assessors signed another declaration, stating *Howard* and *Richardson* to be duly elected. On the morning of 5th *November*, *Potts* was served with a notice, from the town clerk, that he was duly elected councillor, and, on the same morning, three councillors administered to him, and he made and subscribed, in their presence, the declaration required by sect. 50 of stat. 5 & 6 *W. 4.*; and the affidavits stated that he did thereby then and there accept and take upon himself the office of councillor, and did at the same time make and subscribe, before the said three councillors, the declaration provided by stat. 9 *G. 4. c. 17. s. 2.*

He

1841.
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 The QUEEN
 against
 The
 Mayor &c. of
 LEEDS.

He delivered the two declarations, so made and subscribed, the same morning, to the town clerk, who then told him that *Richardson* had not made either of the declarations. And affidavit was made, on information and belief, that *Richardson* made the two declarations a little before eleven the same morning. *Potts*, on 9th *November* 1840, attended a meeting of the council held for the election of a mayor for the ensuing year, and tendered his vote, but the mayor (for the expiring year) and council refused to receive his vote. On 23d *December* 1840, *Potts* again made and subscribed the declaration required by stat. 9 G. 4. c. 17. s. 2., before two justices of the borough. On 26th *December*, the last mentioned declaration was delivered to the town clerk. On 1st *January* 1841, *Potts* attended another meeting of the council, and demanded to be allowed to vote, stating that he had made the last mentioned declaration; but the mayor and council refused to receive his vote. *Potts* deposed to his qualification, and negatived his being under any disqualification.

In answer, the presiding alderman and two assessors made affidavit, from which it appeared that doubts had arisen as to the validity of several of the votes tendered, and that the alderman and assessors entered into an examination of the votes, but had not time to go over them accurately before two o'clock in the afternoon of the 4th of *November*, and accordingly, just before that hour, under sect. 35 of stat. 5 & 6 W. 4. c. 76., they signed the declaration of that day; but that the alderman and one of the assessors (the other having been taken ill) continued the examination, and found the real number of legal votes to be, for *Howard* 211, *Richardson* 210, *Potts* 208, *Fairbairn* 208; that they (the other assessor
 still

still continuing ill) signed the second declaration of 4th *November*, which was also signed by the mayor, and posted soon after by the town clerk on the town hall door: and that they believed the numbers to be as in that declaration. The town clerk then deposed that, being uncertain whether *Potts* or *Richardson* ought to be summoned, he gave notice first to *Howard*, next to *Potts*, and lastly to *Richardson*, to attend on the 5th *November* at the council room, for the purpose of qualifying and making the declarations, which *Richardson* then did before the mayor and an alderman, both being justices of the borough, together with the other councillors elected (as appeared to be the usual practice of the borough), but after *Potts* had made the declarations before the three councillors. It further appeared that, on 4th *November*, *Potts* was served with a notice, signed by two burgesses, that the declaration of his election was erroneous. The affidavits also contained details as to the validity of the votes that were finally rejected. *Richardson* deposed to his qualification, and negatived any disqualification; and stated that, since he had made the declarations, he had acted as a councillor of the borough by attending the council and voting, and continued still so to act.

1841.

The QUEEN
against
The
Mayor &c. of
LEEDS.

Sir *J. Campbell*, Attorney General, and *Wightman*, now shewed cause. Probably the Court would not enter into questions as to the validity of the disputed votes on the discussion of this rule. But the rule must be discharged, on the ground that this is not the proper course of proceeding. The affidavits shew that the office is full. The question should be tried by a quo warranto against *Richardson*, who has been ad-

1841.
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 The QUEEN
 against
 The
 Mayor &c. of
 LEEDS.

mitted and has acted. [*Patteson J.* The statute requires no admission, but prescribes only a publication by the returning officer, and a declaration to be made by the party whose election is so published.] Here the first publication in favour of *Potts* was considered to be erroneous by the officer who made it: he therefore published that *Richardson* was elected. [*Patteson J.* That second publication must be altogether void, because it was not made by two o'clock on the afternoon of the day but one after the election.] The right of neither party can depend upon the publication, because the officer had no right to publish the name of the party who had not the majority of votes. [*Patteson J.* But, if the officer had no right to make the second publication, *Richardson* has acted as a mere stranger; and then how can you say that the office is full of him? And it is clear that the officer, supposing his first publication to be erroneous, could not correct it after two o'clock on the 4th of *November*; otherwise this might go on for ever.] In *Regina v. The Mayor, &c. of Oxford* (a) it was held that, if a councillor be ousted and another elected, and such election be merely colourable, a mandamus will go to permit the ousted party to exercise his office, not to restore him to his office; though, if the ousting and election be bonâ fide, the proper remedy is, not by mandamus to restore the party ousted, but by a quo warranto against him who is in de facto. [*Patteson J.* There the regular forms had been gone through.] Here there can be no doubt that *Richardson* was bonâ fide admitted. [*Patteson J.* According to that, the town council might admit a party who had

(a) 6 A. & E. 349.

not a single vote, and then say that the office was full. *Potts* was in de facto; and the quo warranto should have been against him.] *Potts* makes the application on the very ground that he has not been admitted. If a quo warranto had been granted against *Richardson*, he could not have denied that he was in (a); whereas, if this rule be made absolute, there will be a return that *Potts* was not duly elected.

1841.

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The QUEEN
against
The
Mayor &c. of
LEEDS.

Cresswell, Sir *W. W. Follett*, and *Joseph Addison*, contra, were stopped by the Court.

LORD DENMAN C. J. Here the person who was in office was *Potts*. All that was done after the returning officer had ceased to have any authority to make the publication was merely void; and the proceedings would be only colourable, within the rule of *Regina v. The Mayor, &c. of Oxford* (b). When Mr. *Addison* obtained the rule, I suggested that he had better take a quo warranto: that was on a supposition that there might be a difficulty in obtaining a quo warranto, if the rule were taken for a mandamus and it afterwards turned out that a mandamus would not lie: but I am glad that he did not follow my advice.

LITLEDALE and PATTESON Js. concurred (c).

Rule absolute.

(a) See *Regina v. Quayle*, ante, p. 508.

(b) 6 A. & E. 349.

(c) *Coleridge J.* was absent.

1840.

Wednesday,
January 29th.

The QUEEN against HARRIS.

Where a rule nisi for a quo warranto in information for exercise of a franchise was obtained within six years after the earliest time at which the defendant appeared to have exercised it, but the motion for a rule absolute was not made till the six years had expired, the Court discharged the rule, holding that it was too late, by stat. 32 G. 3. c. 58. s. 1., to file the information.

SIR F. POLLOCK, in last *Easter* term (7th May 1839), obtained a rule nisi for an information in the nature of a quo warranto against *John Harris*, for claiming to exercise the franchise of a free miner of the forest of *Dean* in the county of *Gloucester*; upon the grounds, first, that he had not worked a year and a day in any coal or iron mine within the hundred of *St. Briavels*; secondly, that he had not been duly registered as such free miner. Cause to be shewn on the first day of *Trinity* term, 1839. The rule had been enlarged, and now came on in the peremptory paper.

Stat. 1 & 2 *Vict. c. 43 (a)* enacts, (sect. 14) "that all male persons born or hereafter to be born and abiding within the said hundred of *St. Briavels*, of the age of twenty-one years and upwards, who shall have worked a year and a day in a coal or iron mine within the said hundred of *St. Briavels*, shall be deemed and taken to be free miners for the purposes of this act." It appeared that, previously to the act, and up to 9th *April* 1832, the free miners, sometimes called free foresters, were alone, by custom, entitled to gales of mines, that is, to take them at a gale or rent; that, from thenceforward to the passing of the act, the crown (being owner of the soil) suspended the right of galing, but applications were in the mean time made by parties

(a) "For regulating the opening and working of mines and quarries in the forest of *Dean* and hundred of *St. Briavels* in the county of *Gloucester*."

claiming

claiming to be within the custom, and that, on 28th (a) May 1833, *Harris* had, in the character of such party, applied for a gale, and had worked it before the act passed. Stat. 1 & 2 *Vict. c. 43. s. 23.* gives the exclusive right of having gales to free miners registered according to the act; and sect. 39, reciting the suspension, and that applications, made as above, had been acted on as if granted, authorizes commissioners to enquire whether such last-mentioned gales can be granted without injury to other gales, and, in such cases, to sanction and confirm them by their award; and they are then to be held as if originally lawfully applied for and granted. The affidavits in support of the motion stated facts impugning the defendant's franchise: the affidavits in answer contained counter-statements, and also called in question the relator's right to apply.

1840.

The QUEEN
against
HARRIS.

Sir *J. Campbell*, Attorney General, and *Tyrwhitt*, now shewed cause, and contended that *Harris*, having made his application on 28th May 1833, had then taken upon himself to exercise, and had exercised, the franchise, and therefore no rule could now be granted, according to stat. 32 *G. 3. c. 58. s. 1.*, six years from that day having expired.

Sir *F. Pollock* was heard in support of the rule.

LORD DENMAN C. J. You are too late. The information could not be filed within the six years. Mr. *Robinson* mentions a case where the Court granted leave

(a) According to the affidavit in support of the rule; but on 20th May 1833, according to the affidavit in answer. Taking the latter date to be correct, it would have been impossible to make the rule absolute in *Trinity* term 1839, that term beginning on 22d May.

1840.

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The QUEEN
against
HARRIS.

to file an information on the day on which the motion was made, in order to save the time, reserving leave to the opposite party to apply to have the information taken off the file, if he could answer the application.

LITLEDALE, WILLIAMS, and COLERIDGE Js. concurred.

Rule discharged (a).

(a) See *Regina v. Stokes*, 2 M. & S. 71.

BOSANQUET and Others *against* RANSFORD, One of the Public Officers of the LEAMINGTON Bank.

PAULET *against* NUTTALL and LAW, Two of the Public Officers of the IMPERIAL Bank of ENGLAND.

Where judgment has been obtained against the public officer of a banking co-partnership, sued on their behalf under stat. 7 G. 4. c. 46. ss. 9, 12, 13., the proper mode of proceeding to execution against a particular partner (not being such officer) is by *scire facias*. The Court will not allow a suggestion to be entered for that purpose on affidavit shewing the individual to be a partner.

IN the first of these actions, commenced against one of the public officers of the *Leamington* bank on behalf of the bank, under stat. 7 G. 4. c. 46. s. 9., a rule was obtained in *Trinity* term 1839 (*June* 11th), calling on the defendant, and on *William Barker*, and several other persons named, to shew cause why the plaintiff should not have leave to enter a suggestion on the judgment roll, after judgment, of the fact of *W. Barker* and the other last-mentioned persons being shareholders or partners of the *Leamington* bank up to and on *June* 6th, 1839.

The rule nisi was granted on affidavit stating that, on *June* 5th, final judgment had been signed by plaintiffs against defendant in an action for money lent to the

the bank: that deponent had inspected the return filed at the Stamp-office on *March* 25th, 1839, by defendant, according to the act (sect. 5), dated and sworn *March* 23d, 1839, whereby *William Barker* and the other parties named after him in the rule appeared to have been then returned as proprietors of shares or partners in the bank: and that, as deponent was informed and believed, the said persons continued shareholders and partners up to and on *June* 6th, 1839.

In *Paulet v. Nuttall and Law*, an action commenced in like manner against public officers, a like rule was obtained in *Michaelmas* term 1839, for a suggestion as to *Robert Field* and several other persons named, who were also called upon, together with the defendants, to shew cause why execution should not thereupon issue against them on the judgment.

This rule was obtained, *November* 7th, on affidavit that the plaintiff had signed judgment against the defendants in an action on a bill of exchange; that one of the deponents had examined the return filed at the Stamp-office, dated and sworn *April* 1st, 1839, whereby *Field* and the other parties named with him in the rule appeared to have been then returned by *Law* as parties concerned in the bank; and that certain persons, but not any of those above mentioned, had been returned, *November* 4th, as having ceased to be partners.

In last *Michaelmas* term (a) these rules, by direction of the Court, were brought on for hearing in immediate succession. In *Bosanquet v. Ransford, Chilton and G. Hayes* shewed cause, and Sir *J. Campbell*, Attorney General, and *Shee* supported the rule. In *Paulet v.*

1840.

BOSANQUET
against
RANSFORD.

(a) *November* 25th. Before Lord *Denman C. J.*, *Patteson, Williams*, and *Coleridge Js.*

1840. *Nuttall* cause was shewn (on behalf of different parties) by *Cresswell* and *Crompton*, and by Sir *W. W. Follett* and *E. James*; and *Wightman* supported the rule.

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BOSANQUET
against
RANSFORD.

Arguments against the rules. The application is grounded on *Bartlett v. Pentland* (a), where the plaintiff, having signed judgment against the secretary of the *St. Patrick Assurance Company*, sued out execution against a member of the company not a party to the record, relying on a statute (5 G. 4. c. clx., local and personal, public) which directed that in actions against the company their secretary should be made defendant, and that, if the plaintiff obtained judgment, execution might be issued against any member; and Lord *Tenterden* said: "Wherever a person not a party to the record is to be affected by the judgment, or wherever the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, there must be a suggestion made, by leave of the Court, in the proper form, so as to afford an opportunity to the party to be affected by it to demur if he thinks the facts suggested are insufficient in point of law, or to plead if he means to deny them." But that was not a deliberate judgment of the Court on argument, as to the particular course to be pursued: the dictum as to a suggestion was not necessary to the determination of the case: and *Penoyer v. Brace* (b) and *Proctor v. Johnson* (c) shew that, where execution is to be taken out against a stranger to the record, *scire facias*, and not suggestion, is the proper mode of proceeding. Lord *Tenterden* says that the party to be affected ought to have an opportunity of demurring or traversing; but

(a) 1 B. & Ad. 704.

(b) 1 Ld. Ray. 244.

(c) 1 Ld. Ray. 669.

on suggestion there would be a difficulty in taking either course. No rule of practice exists to regulate the time or manner of pleading in such a case: a new code must be introduced. Stat. 7 G. 4. c. 46. s. 9. makes banking copartnerships liable to be sued in the name of their public officer, and sect. 12 enacts that every judgment obtained in such action against the public officer shall have the like effect upon the property of such copartnership, and of every member, as if obtained against the copartnership: but it does not follow that execution may thereupon issue against any partner on a mere suggestion. It would be against all principle that a number of persons should be so bound by the result of an action against the individual. The words "shall have the like effect" shew that the judgment is against the public officer, not the partners, though execution may issue against a member or members of the copartnership. Sect. 13 treats the two proceedings as matters of distinct regulation. The company are not parties, but privies only, to the record; the question is, how they are to be made parties; and there is no instance in which a new person has been introduced on the record for the purpose of execution, except by sci. fa. Lord *Tenterden* observed, in *Bartlett v. Penland* (a), that "a judgment against *A.* will not warrant an execution against *B.*;" that case does not, substantially, decide more. In *Barton v. Hunter* (b), there cited, the plaintiffs, having obtained judgment against the nominal defendant, secretary of the *St. Patrick Assurance Company*, entered a suggestion under the Company's Act (without leave of the Court), that

1840.

BOSANQUET
against
HANSFORD.

(a) 1 B. & Ad. 704. 711.

(b) *Hudson & Brooke's K. B. and Exchequer Chamber Reports (Ireland)*, 569.

certain

1840.

BOSANQUET
against
RANSFORD.

certain persons were members, and at once proceeded to execution against them: the defendants applied to the Court of K. B. in *Ireland*, to give them an opportunity of traversing the suggestion; and the Court set aside the executions; but the propriety of proceeding by suggestion rather than by sci. fa. was not considered in the judgment. The doctrine said to have been laid down in *Hinde v. Hunter (a)*, "that a party who had obtained a judgment against the secretary of this company might at his peril take out execution against any member of the company," might be true if all the members were parties to the record; not otherwise. In *Hickman v. Colley (b)* a suggestion was made, by leave of the Court, as the only mode of giving effect to the act (for recovery of small debts), 3 Jac. 1. c. 15.; but there no new party was introduced. Where a death is suggested, under stat. 8 & 9 W. 3. c. 11. s. 7., no sci. fa. is needed, because there is no introduction of a new party: but in the cases of marriage and bankruptcy between judgment and execution a sci. fa. is necessary (c). If the persons against whom this application is made were parties to the record at the time of the judgment, no suggestion is requisite; if they were not, the rule referred to in *Penoyer v. Brace (d)* applies, and execution cannot issue without a sci. fa. [*Patteson J.* It comes then to be a question how we are to construe sect. 13 of stat. 7 G. 4. c. 46., which says that, on judgment against "any public officer for the time being" of such copartnership, execution "may be issued against any member or members for the time being;" and that, if such execution shall be ineffectual,

(a) Cited in *Bartlett v. Penland*, 1 B. & Ad. 710.

(b) 2 Stra. 1120.

(c) See 2 Tidd, 1114—1120. 9th ed.

(d) 1 Ld. Ray. 244.

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the party obtaining judgment may issue execution against any person who was a partner at the time when the contract upon which judgment may have been obtained was entered into, or became a member before such contract was executed, or was a member at the time of the judgment obtained: provided that no such execution as last-mentioned shall issue "without leave first granted, on motion in open court," of which notice shall be given to the party charged; nor after the expiration of three years next after such person shall have ceased to be a member of the copartnership.] The clause must mean that, where judgment is obtained against the public officer, present and late members of the copartnership may be made parties to the record for the purpose of execution; with leave of the Court in the cases referred to by the proviso; without leave in other cases. *Bartlett v. Pentland* (a) shews that a mere motion for leave to issue execution would not be sufficient. The Court might decide on motion, whether the special cause assigned for the application were good or not; but the question whether the party was or had been a partner ought to be determined by a jury. What is meant by the words "for the time being" in this clause seems ambiguous; but the context implies that persons may in particular cases be made liable to execution, who could not have been parties to the record when judgment was obtained. [Coleridge J. "For the time being," when first used in sect. 13, seems to mean at the time of action brought; probably the words are used afterwards in the same sense.] (b).

1840.

BOSANQUET
against
RANSFORD.

Arguments

(a) 1 B. & Ad. 704.

(b) In *Bosanquet v. Ransford* it was objected that the affidavits in support of the rule were insufficient, as they did not furnish a certified copy

1840. Arguments in support of the rules. *Bartlett v. Pentland* (a) is an express authority for the proceeding by suggestion, and was acted upon last *Trinity* term, when a rule was made absolute in *Bosanquet v. Ransford* (b) for a suggestion against other members of this copartnership, under circumstances similar to those now before the Court. Too much difficulty would be thrown in the way of executions if the present objection prevailed. Each *sci. fa.* would be a new action, and would perhaps oblige the plaintiff to meet a new defence. He is a stranger to the company's proceedings under the act, and must take for granted that those parties are shareholders who are stated to be so in the return verified by the public officer. The officer is liable to punishment (*s. 18.*) if he wilfully makes a false return: the public are entitled to assume that it is true. The dictum cited from *Penoyer v. Brace* (c) relates to the introduction of a new party on the record: here the object is only to shew who are the real parties. The public officer is nominally the defendant; but the action is really against

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BOSANQUET
against
RANSFORD.

copy of the return sent in to the Stamp-office, which, by stat. 7 G. 4. c. 46. *s. 6.*, "shall" "in all cases whatsoever, be received in evidence as proof" "of the fact that all persons named therein as members" of the copartnership, were members at the date of the return. But, *Per Curiam*: It does not appear to us that the copy of the register must be set out on affidavit. See *Edwards v. Buchanan*, 3 B. & Ad. 788. Some other objections, on which nothing ultimately turned, are omitted.

(a) 1 B. & Ad. 704.

(b) May 8th, 1839. Before Lord Denman C. J., Littledale, Patteson, and Coleridge Js. The present objection was not taken; but an endeavour was made to shew that the application was really set on foot by partners in the bank to enforce payment of calls by their copartners. Sir J. Campbell, Attorney General, and Shree, supported the rule; and R. V. Richards shewed cause. *Bartlett v. Pentland* (1 B. & Ad. 704.) was cited.

(c) 1 Ld. Ray. 244.

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the company. They are, substantially, on the record. If the plaintiff had declared against the partnership in extenso, he could but have taken the names which appear in the return. [*Coleridge J.* Do you say that in such an action a party named in the return could not prove that he was not a partner?] It might perhaps be contended that, to avoid liability, he should remove his name from the return. But it is enough to say that the return is proof, though it may not be conclusive. There is no authority deciding that a suggestion, if made, might not be traversed; difficulties might perhaps arise in point of practice; but that question would be more fitly discussed when the suggestion was made. It would seem, but for *Bartlett v. Pentland* (a), that, under this act, the plaintiff was entitled to have execution at once against the parties named in the return. *Primâ facie*, at least, he is entitled; and, on the authority of that case, leave to enter a suggestion will be granted: on suggestion being made, the Court may perhaps suspend execution till the right, as against individual parties, can be tried, if a trial of it should be required: but it may turn out that the opposition is made merely for delay. The words "members for the time being," in sect. 13, probably mean those persons who might have been made parties to the record by name if the action had been brought against the partnership in extenso.

Cur. adv. vult (b).

Lord

(a) 1 B. & Ad. 704.

(b) It was mentioned to the Court, at the close of the argument, that the same point was then under consideration in the courts of Common Pleas and Exchequer. See *Whittenbury v. Law*, 6 New Ca. 345., and
Cross

1840.

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BOSANQUET
against
RANSFORD.

1840.

BOBANQUET
against
RAWFORD.

Lord DENMAN C. J. in this term, *January* 17th, delivered the judgment of the Court.

The case of *Bartlett v. Pentland* (a) has decided that, where an act of parliament authorises the making an officer of a copartnership the nominal defendant, but gives power to the plaintiff to take out execution against the copartners as being the real defendants, it is necessary to obtain the authority of the Court in some way before such execution can be had. The question is as to the mode of obtaining that authority, whether by suggestion or by scire facias; and it depends on this point, whether new parties are to be introduced upon the record. The uniform course, if new parties are introduced, is by scire facias: suggestion is applicable only to collateral facts affecting the same parties; as, for example, change of name, allowance or disallowance of costs under acts of parliament, and similar matters. Now in the present case, assuming that the nominal defendant is, by the operation of the act under which he is made defendant, to be considered as the copartnership, and that they are the real defendants, still it is left uncertain what individuals constitute that copartnership; and the introduction of any person by name as a copartner is in effect the introduction of a new person on the record. We think, therefore, that the proper mode of proceeding, by analogy to all former cases, is by scire facias, and that this rule for entering a suggestion must be discharged. Therefore, we admit the authority of *Bartlett*

Cross v. Law, 6 M. & W. 217.; in which those courts subsequently adopted the decision given in the case here reported. Also *Harwood v. Law*, 7 M. & W. 203.

(a) 1 B. & Ad. 704.

v. *Pentland* (a) as to the principle, which is that parties are not to be charged without an opportunity of contesting their liability, but differ as to the mode of proceeding by suggestion, which was not indeed the matter there in dispute.

1840.

BOBANKET
against
RAMSFORD.

Rule discharged (b).

(a) 1 B. & Ad. 704.

(b) See *Eardley v. Law*, Mich. T. (Nov. 27th) 1840; post.

DREWE against LAINSON and SALOMONS,
Esquires.

Friday,
January 24th.

CASE. The first count of the declaration stated that plaintiff heretofore, towit 9th *April* 1836, in the Court of King's Bench, by the judgment of that Court, recovered against *Edmund Allgood Dickinson* 210*l.*, for damages, as well for not performing certain promises as for costs, as by the record &c.: that, the judgment being in full force and the damages unpaid and unsatisfied, plaintiff, on 22d *June* 1836, sued out a testatum *fi. fa.*, directed to the sheriff of *Middlesex*, commanding him to cause to be levied, of the goods and chattels in his bailiwick of the said *E. A. D.*, the sum of 210*l.*, and that the sheriff should have that money before our Lord the King &c., immediately after the execution thereof, to render to plaintiff, and should have there that writ: that the writ recited a return of *nulla bona* by the sheriff of *Surrey*, and that it was testified that *E. A. D.*

Declaration by execution creditor against sheriff, for falsely returning *nulla bona* to a *fi. fa.*, alleged that the sheriff seized goods of great value, to wit, of the value of the monies included in plaintiff's writ, and then levied the same thereout. Plea, that *F.* had sued out a prior writ of *fi. fa.* which was delivered to sheriff before plaintiff's writ, and remained unexecuted in sheriff's hands; and sheriff, after

seizing the goods under plaintiff's writ, and before they were sold under the same, seized them under *F.*'s writ, and sold them for the utmost price &c., but for a sum insufficient to pay the sum indorsed on *F.*'s writ, and paid the sum to *F.*:

Plea held bad, on special demurrer, as an argumentative traverse of the allegation, that the sheriff had levied the monies indorsed on plaintiff's writ; such levy consisting in a sale, the proceeds of which would be applicable to plaintiff's writ.

had

1840.

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Darve
against
Lainson.

had sufficient &c. in the bailiwick of the sheriff of *Middlesex*: that the writ was, before delivery of it to the sheriff of *Middlesex*, indorsed to levy 128*l.* 1*s.* 6*d.*, and 1*l.* for the writ &c.; that the writ, before its return, to wit on &c., was delivered to defendants, who then, and thence until and at and after the return of the writ, were sheriff of *Middlesex*, to be executed &c.: by virtue of which writ defendants, before the return thereof, within their bailiwick, seised and took in execution divers goods and chattels of the said *E. A. D.* of great value, *towit* of the value of the monies so indorsed on the said writ and directed to be levied as aforesaid, *and then levied the same thereout*: yet defendants, not regarding their duty &c., had not the said money so levied as aforesaid, or any part thereof, before our said Lord the King &c., at the return of the said writ, according to the exigency &c., nor have they paid the said sum of 128*l.* 1*s.* 6*d.*, or the sum of 1*l.*, or any part thereof, to plaintiff: and the said sheriff, after the said levy, *towit* on 2d *July* 1836, falsely &c. returned (*nulla bona*).

Plea, that, before the delivery of the writ to defendants, *towit* 17th *December* 1835, one *John Fox* sued out of the Court of King's Bench a writ of *fi. fa.* directed to the sheriff of *Middlesex*, commanding him to cause to be levied, of the goods and chattels of *E. A. D.*, as well a debt of 475*l.* which *J. F.* had recovered against *E. A. D.*, as also 7*l.* 3*s.* awarded to *J. F.* for damages for the detention of debt and costs, and that the sheriff should have that money before &c., immediately after the execution thereof, to render to *J. F.*: that the writ, before the delivery thereof to the sheriff, and before the delivery of the writ in the first count mentioned, *towit* on &c., was indorsed to levy 484*l.* 1*s.* 2*d.*, besides sheriff's poundage,

poundage &c., and, before the return thereof, towit on &c., and long before the delivery of the writ in the first count mentioned to defendants, was delivered to defendants, who were sheriff &c., to be executed &c.; by virtue of which said writ at the suit of the said *J. F.*, the same being then unexecuted and in force, defendants, so being sheriff of the said county of *Middlesex*, afterwards, and before the return of the said writ at the suit of the said *J. F.*, and after the seizing and taking in execution the said goods and chattels of the said *E. A. D.* under the said writ in the first count mentioned, *and before the said goods and chattels, or any part thereof, had been or were sold or disposed of under and by virtue of the said writ in the said first count mentioned*, towit on the day and year last aforesaid, seized and took in execution the said goods and chattels of the said *E. A. D.* in the first count mentioned, for the purpose of levying the monies so directed to be levied by the said indorsement on the writ at the suit of *J. F.* as aforesaid, and *did then sell the same* for a certain sum of money, towit 144*l.* 17*s.*, being the full value and utmost price that could be obtained for the same, being a sum less than, and insufficient to pay, the monies so directed to be levied by the said indorsement on the said writ at the suit of the said *J. F.*, and which then remained due and unsatisfied; which said sum of 144*l.* 17*s.*, the proceeds of the sale of the said goods and chattels in the said first count mentioned, defendants then paid to the said *J. F.*, according to the exigency of the said writ at the suit of the said *J. F.*

Verification.

Special demurrer, assigning for cause that the plea is, or is intended to be, in substance, an argument-

VOL. XI.

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1840.

DEWE
against
LAINSON.

1840.

DEWE
against
LADRON.

ative traverse of the allegations in the declaration, or some of them, yet does not conclude to the country, or with an absque hoc; and that it is an argumentative traverse of the allegation in the declaration, *that the defendants levied the monies so indorsed on the writ in the first count mentioned, of the goods of E. A. D. in the first count mentioned*, yet does not traverse in the words of the declaration, nor sufficiently confess or avoid: and that plaintiff, in replying, would have to confine himself to traversing one only of the facts alleged in the plea, namely, the delivery to defendants of the writ at the suit of *For* before the writ mentioned in the first count, its remaining in their hands unexecuted, the seizure of the goods of *E. A. D.* under it, and that such seizure was before its return: whereas plaintiff ought to be at liberty to controvert each of such facts: and also that the plea, if true, afforded no answer to the first count (a).

The case was argued in last *Michaelmas* term (b).

Peacock for the plaintiff. The declaration alleges that the defendants levied the monies indorsed on the plaintiff's writ; the plea alleges facts shewing that the goods were not sold under plaintiff's writ. That is an argumentative traverse: for the monies indorsed on the plaintiff's writ were not levied unless the sale was under that writ. The monies are not levied till the goods are sold. The command in the writ is, that the sheriff levy, not the goods, but *the sum* of 210*l.*, of the goods,

(a) There was a second count for a false return to a *fi. fa.* on another judgment, recovered by plaintiff against *Dickinson*; to which the defendants pleaded the same proceedings at *For's* suit, and the plaintiff demurred specially for the same causes.

(b) *Tuesday, 19th November, 1839.* Before Lord Denman C. J., *Patteson, Williams, and Coleridge* Js.

and

and have *that money* &c. Where a sheriff, on receiving a writ, seizes, he is to satisfy from the proceeds any previous writ which is in his hands; *Hutchinson v. Johnston* (a), where *Smalcomb v. Buckingham* (b) was cited. In the case last mentioned, it was held that, if the goods be actually sold under the second writ, the sale will stand good. This shews that it is the sale which constitutes the levy.

Kennedy, contra. In *Godson v. Sanctuary* (c) goods were seized under a *fi. fa.* two months before the issuing of a commission of bankruptcy; but the sheriff sold them within the two months: and it was held that this was an execution “bonâ fide executed or levied more than two calendar months before the issuing of such commission,” and therefore protected by the Bankrupt Act, stat. 6 G. 4. c. 16. s. 81. The allegation of the levy, therefore, in this declaration, relates to the seizure; and that is not traversed by the allegation of sale. *Hutchinson v. Johnston* (a) shews only that, when there is a seizure under one writ, any execution creditor having a prior writ in the sheriff’s hands is entitled to priority: but that case did not turn upon the distinction between seizing and selling. A similar doctrine is laid down in *Saule v. Paynter* (d) and *Jones v. Atherton* (e). [Patteson J. In *Smalcomb v. Buckingham* (b) the decision was only that, in the case of a sale in satisfaction of the second writ, the vendee is protected, and the remedy of the prior execution creditor is against the sheriff.] The reason of that is, that before the sale the execution credi-

1840.

DRAWN
against
LAINSON.

(a) 1 T. R. 729.

(b) Carth. 419.

(c) 4 B. & Ad. 255.

(d) 1 D. & R. 307.

(e) 7 Taunt. 56.

1840.

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DREW
against
LAINSON.

tor has nothing to do with the goods levied upon. Here, in point of law, the seizure is under both writs ; but it enures, in the first instance, to the satisfaction of the prior writ. The plea, therefore, confesses and avoids. Even if the sale be the levy, the plea confesses and avoids ; for it shews a levy under both writs, and therefore confesses the levy under the plaintiff's writ. There might be enough for each writ. It is, at least, a pleading of matter of law with colour. In *Jones v. Atherton* (a) Gibbs C.J. says : " If the sheriff has the writ in his office, though no warrant be made on it, if he afterwards gets possession of the goods, *though apparently under another writ*, yet his possession shall enure to the use of the first writ." In *Saunders v. Bridges* (b), two writs being in the hands of the sheriff, the goods were seized and sold, and the proceeds were insufficient to satisfy the prior writ. Afterwards the defendant set aside the first execution ; and the sheriff was ordered to refund the proceeds to him, and did so : and it was held that the sheriff, having afterwards returned nulla bona on the second writ, was liable for a false return to the execution creditor under that writ. [Lord Denman C.J. There the first execution entirely failed.] The case shews that the process is for the benefit of all the execution creditors, subject to the order of priority. Not only is a sale under the second writ good, but, if the prior creditor have been guilty of laches, he loses his remedy against the sheriff ; *Payne v. Drew* (c). [Patteson J. The present plea, then, would come to this, that the sheriff first levied, but afterwards levied ; that is, he first sold, but then sold.] The first levy, so admitted, is by subsequent matter shewn not to be, in law, a levy under the plaintiff's writ. That, being

(a) 7 Taun. 58.

(b) 3 B. & Ald. 95.

(c) 4 East, 523.

matter of law, should not be shewn by way of traverse; *Com. Dig. Pleader*, (G 5.), *Dangerfield v. Thomas* (a), *Pearson v. Rogers* (b). In *Hallifax v. Chambers* (c) the declaration stated that the defendants were tenants to plaintiff, and that it was their duty, as such, to cultivate according to the custom of the country &c.; the plea denied the tenancy in manner &c.: it was held that this did not put in issue the duty resulting from the tenancy. *Morant v. Sign* (d) is an instance of express colour given since the new rules.

1840.

DREW
against
LAINSON.

Peacock in reply. The plaintiff, by alleging a levy under his own writ, alleged a sale, as he was bound to do: else, it might have been that the goods remained in the sheriff's hands for want of buyers. It is the sale that extinguishes the debt; *Morland v. Pellatt* (e). [*Patteson* J. It seems that the seizure was considered to do so in *Clerk v. Withers* (g).] After seizure, the creditor may have a venditioni exponas: if the goods be not sold, the return of the fieri facias always is, not that they have been levied, but that they have been taken. The defendant might have traversed here, though there is matter of law, the *virtute cujus* involving also fact; *Lucas v. Nockells* (h). The matter of law might have been set out as an inducement to an absque hoc, concluding to the country. *Rybot v. Peckham* (i) shews that the sale under the plaintiff's writ gave him the title to the proceeds. [*Patteson* J. referred to note (a) in *Tidd's Practical Forms*, p. 402. ed. 6., ch. xli. s. 2.]

Cur. ad. vult.

(a) 9 A. & E. 292.

(b) 9 A. & E. 303.

(c) 4 M. & W. 662.

(d) 2 M. & W. 95.

(e) 8 B. & C. 722.

(g) 2 Ld. Raym. 1072.

(h) 10 Bing. 157.

(i) Note (a) to *Hutchinson v. Johnston*, 1 T. R. 731.

1840.

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DREW
against
LAINSON.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows.

The plaintiff demurs specially; assigning, amongst other grounds, that the plea is an argumentative traverse of the allegation in the declaration, *that the defendants "levied the same thereout,"* and yet does not conclude to the country, or with a traverse, *absque hoc*.

The case turns on the precise meaning of those words in the declaration.

If they necessarily mean that the defendants *raised, by sale of the goods, monies applicable to the plaintiff's writ*, then undoubtedly the plea is an argumentative traverse; for it shews that the monies raised by the sale were not applicable to the plaintiff's writ, but to *Fox's*; and the plea would then be bad, for the reason assigned.

If they mean, or if the defendants were at liberty to treat them as meaning, *that the defendants turned the goods into money, and no more*, then the plea is not open to the objection assigned; for it confesses such turning into money, and the non-payment to the plaintiff, and avoids by shewing that the money was properly applied to *Fox's* writ.

If they mean *that the defendants turned the goods into money under the plaintiff's writ*, but not, of necessity, *that the monies so raised were applicable to the plaintiff's writ*, then the plea is not open to the objection assigned, because it confesses, though not in the most formal manner, that the goods were sold under the plaintiff's writ, but adds that they were sold also under *Fox's* writ, which had priority, and avoids the non-payment to the plaintiff,

plaintiff, by shewing that the proceeds were insufficient to satisfy *Fox*.

1840.

DREW
against
LAINSON.

The duty of the sheriff, when he has several writs of execution, is clear. He is to execute them according to their priority; which, as to writs of fieri facias, is according to the time of their delivery to him. By "executing" is meant, that he is to apply the proceeds of goods seized in that manner. It is not material whether he seizes the goods under the first or the last writ: as soon as they are seized, they are, in point of law, in his custody under all the writs which he then has; and, when he sells them, he sells, in point of law, under all the writs. This is obviously so: for, if the proceeds are more than sufficient to satisfy the first, he must apply the surplus to the second, and so to the third and others; and, as the amount for which the goods will sell is uncertain, he cannot be said to sell under the first writ only. The facts stated in this plea, which, upon demurrer, must be taken to be true, shew that the defendants have done their duty properly; and the only question is, whether they are right in stating those facts specially, or should have taken an issue on the plaintiff's allegation, and given the facts in evidence. It is purely a technical question of pleading.

Now the apparent meaning of the allegation, "then levied the same thereout," and that which the plaintiff must have contemplated, is the meaning first above stated. If, then, the defendants had traversed that allegation, by pleading simply "that the defendants did not levy out of the goods so seized the monies directed to be levied by the plaintiff's writ," such traverse would have put in issue these three questions: — 1. Whether the goods were sold at all; 2. Whether they were sold

1840.

DREWE
against
LAINSON.

under the plaintiff's writ; 3d, Whether the proceeds were applicable to the plaintiff's writ. The plaintiff would have proved the issue, *primâ facie*, by shewing a sale; because, as the traverse would have admitted the seizure under the plaintiff's writ, any sale would be presumed to be also under the same, and the proceeds to be applicable to it. But the defendants, in answer, would have been at liberty to shew the facts which they have stated in their present plea, to negative the third question so put in issue. The traverse would not have been demurrable, because it would have put in issue *mixed questions of law and fact*, and not a mere conclusion of law: *Lucas v. Nockells (a)*. In pursuing such a course, the defendants would have been right; but the question remains, were they bound to do so?

Upon the argument, and since, we doubted whether they might not ascribe to the allegation the meaning secondly, or, at any rate, thirdly, above stated.

On further consideration, we are of opinion that the words "*then levied the same thereout*" necessarily mean more than a seizure under the plaintiff's writ and a sale of some sort. They mean, also, that the defendants had in their hands the proceeds of the sale for the purpose of handing over to the plaintiff; otherwise the plaintiff does not shew any right upon the face of the declaration. It is necessary to give the words this sense, in order to cast a duty on the defendants, the breach of which is the not paying over the money: for, unless they had the money for that purpose, no breach of duty is shewn. The defendants, therefore, were bound to ascribe to the words the meaning first above mentioned, and ought to have traversed them.

(a) 10 Bing. 157.

We think, however, that they should have leave to amend on payment of costs.

1840.

Leave to amend (a).

Darwin
against
LAINSON.

(a) See the next case.

(The following case, decided in *Easter* Term, 1841, may conveniently be inserted here.)

WINTLE *against* **FREEMAN**, Esquire.

[*Monday,*
April 26th,
1841.]

CASE. The declaration stated that plaintiff, on 17th *May* 1837, in the Court of King's Bench, recovered a judgment against Viscount *Chetwynd* for 318*l.* 3*s.*, damages and costs, in assumpsit; and, on 16th *November* 1838, sued out a writ of *fi. fa.* thereon, directed to the sheriff of *Oxfordshire*, commanding him to levy the 318*l.* 3*s.*, and have the money immediately after execution to render to plaintiff, which writ was indorsed to levy 185*l.* 6*s.* 5*d.*, and was delivered to defendant, being sheriff of *Oxfordshire*, to be executed: by virtue of which writ defendant seized and took in execution divers goods and chattels of Viscount *Chetwynd*, of great &c., towit of the value of the monies so indorsed and directed to be levied, and levied the same thereout: yet defendant, not regarding &c., but contriving &c., had not the said monies so levied as aforesaid, or any part thereof, according to the exigency of the said writ and indorsement, but therein wholly failed &c., nor hath he paid the said sum of 185*l.* 6*s.* 5*d.*, or any part thereof, to plaintiff: and defendant, after

Plaintiff having issued a *fi. fa.*, the sheriff seized goods, the proceeds of which were exhausted by payment of a year's rent to the landlord under stat. 8 *Ann. c. 14. s. 1.*, the expenses, and the sum due upon another writ of *fi. fa.* previously delivered to the sheriff.

Held, that a return of *nulla bona* to the plaintiff's writ was proper, and that the sheriff, in an action against him for falsely making such return, might shew the above facts, under a plea that the original defendant had no goods whereof the

sheriff could levy the damages in the declaration mentioned.

the

1841.
 ———
 WINTLE
 against
 FREEMAN.

the said levy, towit on 10th *February* 1839, falsely and deceitfully returned to the said Court, upon the said writ, that Viscount *Chetwynd* had not any goods or chattels in his bailiwick whereof he could cause to be levied the damages of 185*l.* 6*s.* 5*d.*, or any part thereof.

Pleas. 1: Not Guilty. Issue thereon.

2. That defendant did not seize and take in execution the said goods and chattels of Viscount *Chetwynd*, by virtue of the said writ of *fi. fa.*, in manner and form &c. Issue thereon.

3. That Viscount *Chetwynd* had not any goods or chattels in defendant's bailiwick, whereof he could cause to be made the said damages in the declaration mentioned, or any part thereof, according to the exigency of the said writ : verification. Replication. That Viscount *Chetwynd* had goods and chattels in defendant's bailiwick, whereof defendant could have made the said damages &c. Issue thereon.

On the trial, before *Alderson B.*, at the *Gloucester* Summer assizes, 1839, the facts proved (as ultimately assumed by the Court in the present case) were as follows. On 16th *November* 1838, a writ of *testatum fi. fa.*, at the suit of *Tawney* and *Gillett*, indorsed to levy 77*l.* 9*s.* upon the goods of Viscount *Chetwynd*, was delivered to the sheriff of *Oxfordshire* at the office in *London*; and a warrant was, on the same day, issued to a bailiff in *Oxfordshire*, *Robert Pike*, and sent to him from *London* by post. On 26th *November* 1838, the *fi. fa.* against Viscount *Chetwynd*, at the suit of plaintiff, was received by the under sheriff at *Henley*, and a warrant thereon was sent by the same day's post

post to *Humphries*, another bailiff, at *Banbury*. *Humphries* entered this second warrant, and under it seized various goods of Viscount *Chetwynd*: but, on the same day, before the goods were removed, a claim was made by the landlord of the premises for 153*l.*, being half a year's rent. Afterwards *Pike*, hearing of the seizure, entered the execution at the suit of *Tawney* and *Gillett*. The goods seized were afterwards sold, and the produce of the execution was either 225*l.* 9*s.* 6*d.* or 205*l.* 9*s.* 6*d.*, according to two different estimates of some goods taken at a valuation. Of this, 153*l.* was paid to the landlord, and the remainder was appropriated to the expenses, and in part satisfaction of the execution at the suit of *Tawney* and *Gillett*; and the return was made as stated in the declaration. The learned Judge directed a verdict to be taken for the plaintiff for nominal damages, with leave to him to move that they might be increased to the amount of the value of the levy, deducting the landlord's rent and the expenses, and with leave to the defendant to move to have a verdict entered for him. Accordingly, in *Michaelmas* term, 1839, *Ludlow* Serjt. obtained a rule nisi for increasing the damages; and *Talfourd* Serjt. obtained a rule nisi for entering a verdict for the defendant.

Ludlow Serjt. and *Francillon* now shewed cause against the latter rule, and supported the rule for increasing the damages. The payment of rent cannot be shewn under any of the three issues joined. The payment of rent out of the goods levied does not negative the fact of the false return, nor the fact of the taking, nor the fact that Lord *Chetwynd* had goods within the bailiwick out of which the execution might be levied. The sheriff, instead of returning

1841.

WINTLE
against
FREEMAN.

1841.
 ———
 WINTLE
 against
 FREEMAN.

returning nulla bona, should have followed the form given in *Impey's Practice of the Office of Sheriff* (a), where the return states a levy to a certain amount, certifies that a part is paid to the landlord, and adds that the sheriff has the residue ready, and that the defendant has no more goods whereof the sheriff can levy. A special return was made in *Keightley v. Birch* (b). [*Patteson* J. Such a return as *Impey* gives is applicable where something remains after the rent is satisfied. Here the levy was exhausted.] The rent would not exhaust the levy, unless the plaintiff's execution was postponed to the other. The other writ was issued first: but it could not be kept hanging over the creditors unexecuted; and the plaintiff, by getting his own writ first executed, acquired a right to the levy; *Kemp-land v. Macauley* (c): and so it is if there be merely a colourable execution of the first writ; *Bradley v. Wyndham* (d). It is true that in *Drewe v. Lainson* (e) the Court said that the duty of the sheriff, when he has several writs of execution, is to execute them according to their priority. (They then stated the judgment in that case, as in p. 537, antè.) *Hutchinson v. Johnston* (g) is also, to a certain extent, an authority against the plaintiff. But, at all events, the facts here should have been specially shewn. The words of stat. 8 Ann. c. 14. s. 1. are, "no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever,

(a) P. 397., 6th ed.

(c) 1 *Peake's N. P. C.* 95. 3d ed.

(e) Antè, p. 529.

(b) 3 *Campb.* 521.

(d) 1 *Wils.* 44.

(g) 1 *T. R.* 729.

unless

unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money." The payment to the landlord may account for the goods, but does not shew that there were none, so as to support the return of nulla bona; therefore, the plea of Not Guilty fails. Then, as to the second plea, the defendant clearly made the seizure. The statute does not forbid seizing where rent is due, but only requires that, after seizure, a year's rent be paid to the landlord before removal. The answer as to the rent should be given by way of confession and avoidance: unless there was a seizure, the fact of the rent being due was immaterial, and the case pointed to by the statute could not have arisen. In *Drewe v. Lainson* (a) the sheriff pleaded a sale under a prior execution specially; and the Court held this an argumentative traverse of the averment in the declaration, that the sheriff levied

1841.

WINTLE
against
FREEMAN.

(a) Antè, p. 529.

under

1841.

WINTLE
against
FREEMAN.

under the plaintiff's writ. But here the plaintiff ought to have an opportunity of denying that the rent was due; and, indeed, he should be entitled, if he pleased, to raise a special issue upon the question, whether the first writ was fraudulent or not.

H. S. Keating, contra. The first writ clearly had priority: for there was no evidence of fraud or laches. *Drewe v. Lainson* (a), *Jones v. Atherton* (b), and the judgment of *Patteson J.* in *Giles v. Grover* (c), are conclusive as to this. Then the facts may be given in evidence under the traverse of the seizure. In *Wright v. Lainson* (d) the Court refused to allow, in answer to an action for a false return of nulla bona, two pleas, one traversing the seizure under plaintiff's writ, the other stating an act of bankruptcy before the seizure under plaintiff's writ, and a fiat after it; though in the same case (c) it had been previously decided that the sheriff could not shew the bankruptcy under Not guilty. A payment of rent by the sheriff who seizes, to the landlord, is a stronger case than a previous bankruptcy, where, no fiat having issued, the right of the assignees is only inchoate at the time of the seizure: at least the right of the landlord may be considered inchoate at the time of the seizure, and complete at the time of notice. The facts may also be shewn under the plea denying that Lord *Chetwynd* had goods of which the sheriff could levy. The declaration avers the delivery of the writ to the sheriff, the levy, and the falsehood of the return of nulla bona.

(a) *Antt*, p. 529.(b) 7 *Taun.* 56.(c) 9 *Bing.* 128. 137.(d) 3 *M. & W.* 44.(e) *Wright v. Lainson*, 2 *M. & W.* 739. See *Lewis v. Alcock*, 3 *M. & W.* 188.

The

The defendant admits the delivery, but denies the levy and the falsehood of the return. The seizure by the sheriff enures to the satisfaction of writs according to their priority: à fortiori, it enures to the benefit of the landlord, who takes precedence of the execution creditor. In *Colyer v. Speer* (a) it was held that the sheriff is liable to the landlord if he remove any of the goods seized, after notice of rent being due, without payment. The statute is not clearly worded: it provides that no goods shall be *liable to be taken* in execution, unless the *party* at whose suit the execution is sued out shall, *before the removal*, pay the rent to the landlord. This seems to create a claim for rent in the nature of a lien: and the sheriff is liable to the landlord, not for non-payment of the rent, but for removing before payment. *Lane v. Crockett* (b) shews that the sheriff is liable to the landlord for removing the goods, even though he does not sell, and restores them unsold. The levy consists in the sale. The sheriff, therefore, as he could not sell, could not levy. Nulla bona is clearly the proper return where a prior writ exhausts all the goods seized; and the same principle must apply where they are exhausted by the combined effect of rent and a prior writ. When the execution is against a beneficed clerk, there is a good reason for a special return, because it gives the execution creditor the information that he may sequester: and the rule may perhaps be so wherever the execution creditor can act on the facts disclosed; but here what benefit could he gain from a knowledge of the special facts? And, further, how could there be a confession here of the levy and the false-

1841.

WINTLE
against
FREEMAN.

(a) 2 B. & B. 67.

(b) 7 Price, 566.

1841. hood of the return? At all events, the plaintiff can have sustained no damage ; and, therefore, upon any view of the pleadings, he cannot have judgment ; *Williams v. Mostyn* (a). [Lord Denman C. J. We have acted on the principle of that case (b).] In the original action here, *Wintle v. Lord Chetwynd* (c), *Patteson J.* held that a sheriff could not return that he had seized goods under two writs. The present return was substituted in consequence of that decision. [*Patteson J.* I did not mean to say that he might not return that some goods were seized under one writ and some under another.]

WINTLE
against
FREEMAN.

Lord DENMAN C. J. It appears to me that the rule for increasing the damages must be discharged, and the rule for entering a verdict for the defendant be made absolute. The return is said to be false, because the sheriff has seized goods out of which he might have levied the sum indorsed on the plaintiff's writ. Now the intention of the statute of *Anne* clearly was to give the landlord an expeditious remedy for his year's rent. That rent, in the present case, absorbed the value of the goods seized : so that the sheriff held no goods out of which the damages could be levied. He has, therefore, done nothing wrong. The only question is, then, whether the execution creditor could be prejudiced by this way of stating the case. I cannot see that he is. No distinction can be pointed out between the exhaustion of the proceeds by payment under a prior writ,

(a) 4 M. & W. 145.

(b) Referring probably to *Randell v. Wheble*, 10 A. & E. 719. See *Brown v. Jarvis*, 1 M. & W. 704. S. C. Tyr. & G. 1033.

(c) 7 Dowl. P. C. 554.

and

and the exhaustion of them by payment of the landlord's rent. Therefore the return of nulla bona is correct. Whether it was necessary to plead the matter specially, or whether the plea of Not Guilty would have sufficed, we need not discuss, but will bow to the decision of the Court of Exchequer (*a*). I consider that the facts prove the third issue for the defendant.

1841.

WINTLE
against
FREEMAN.

PATTESON J. The rule for increasing the damages must be discharged; for it assumes that the first writ had not priority. Now it is clear that, although the goods were seized under the second writ, yet, unless they were sold under it, the plaintiff cannot insist upon having the fruits of the execution. As to the second rule, I cannot see how the defendant could have pleaded his defence specially, for by so doing he must have admitted that the return of nulla bona was false; whereas the question which is to be raised is, whether nulla bona be a good return: if it is, the traverse in the third plea was proper. I think it is a good return. The sheriff, in making his return, is not bound by the rules of special pleading: but, if that were otherwise, what are the special facts here? That the sheriff seized the goods, and paid the landlord's rent, and what was due upon the prior writ. And what is the effect of this? That no goods were applicable to the plaintiff's writ, and therefore there were nulla bona. As to stat. 8 *Ann. c. 14. s. 1.*, it is certainly remarkable that an action has been held to lie against the sheriff for removing without paying the landlord. At first it is said that he is to take nothing unless the execution creditor shall pay the landlord's rent before the goods are removed. The

(a) *Wright v. Lainson*, 2 M. & W. 739.

1841.

WINTLE
against
FREEMAN.

difficulty arising upon this provision might, I think, be got over. But then it is enacted that the goods shall not be taken unless the execution creditor, before the removal, pay to the landlord, not the value of the goods taken, but a year's rent, if no more be due; and, if the arrears exceed a year's rent, then the execution creditor may pay the year's rent and execute his judgment, and the sheriff is to levy and pay to him both the money paid for rent, and the execution money. I suppose the present practice originated in this, that the method prescribed by the statute was found to be circuitous: the sheriff took enough to satisfy the landlord and the execution creditor, and himself made the payment to each of them: and this course finally prevailed. Now, suppose the sheriff to seize, and the arrear of rent to exceed the value of what is seized, what is he to do? He must pay all over to the landlord. Then what return must he make? He must say that he has no goods. The reason that such returns are not common is that usually more is got than will satisfy the year's rent, so that a special return must be made as to the residue. In the present case, had there been only the rent, there would have been such a residue: but there is also the previous writ: and the two together exhaust the proceeds. As to *Wintle v. Chetwynd* (a), what I am reported to have said there is not correct. The return, indeed, was bad; for the sheriff cannot shew generally that he seized under two writs; he ought to shew the amount due on the earlier writ, and the value of the goods seized. But, if the report be correct (as I dare say it is), I was quite wrong in saying that it was impossible to seize under both writs. There may be many writs in the sheriff's hands at the time of the seizure; and he seizes under all.

(a) 7 Dowl. P. C. 554.

WILLIAMS J. I had some doubt whether the return was applicable to the facts; but, for the reasons which have been given, I am satisfied that it is so. The special return suggested would be merely an argumentative return of nulla bona. It would state that the sheriff had seized, and that he had had notice from the landlord, and had paid him the year's rent, which, with the sum due on the prior writ, absorbed all the proceeds of the execution. What would that be but saying, at large, that the defendant had no goods whereof the sheriff could levy the sum due on the plaintiff's writ?

1841.

WINTLE
against
FREEMAN.

WIGHTMAN J. I am of the same opinion, for the reasons that have been given.

Rule for entering verdict for the defendant absolute. Rule for increasing the damages discharged.

JOHNSTON and Another *against* USBORNE.

ASSUMPSIT. The first count stated that plaintiffs were retained by defendant to sell on his account, for certain commission in that behalf, 1000 to 1200 barrels of prime well prepared *Limerick* oats, of 39 lbs. and upwards per imperial bushel, at 9s. 6d. per barrel of 196 lbs., free on board, to be shipped by defendant immediately, freight to be obtained as low as possible,

Defendant, a corn merchant in *Ireland*, sent written instructions to plaintiff, a corn factor and del credere agent of defendant in *London*, to sell oats of a certain quality at a certain price on his (defend-

ant's) account. Plaintiff sold them, as described by defendant, in his own name. The oats proved to be of inferior quality; and plaintiff was obliged to pay to the vendee the difference in value. In an action to recover the difference, it was objected by defendant that plaintiff had no right to sell in his own name and thereby to incur liability: Held, that evidence was admissible for the plaintiff to shew that, by the custom of the *London* corn trade, a factor was warranted by such instructions in selling in his own name.

1840.

JOHNSTON
against
USBORNE.

but guaranteed by defendant not to exceed 2*l.* 10*s.* per quarter, primage to be paid for at sixty days from date of bill of lading: That, in consideration of the premises, and that plaintiffs, at defendant's request, had promised him to guarantee to him payment for the said oats so to be sold at the price and on the terms aforesaid, defendant promised plaintiffs to ship on their account 1000 to 1200 barrels of oats, which, at the time of shipment, should be prime, well prepared *Limerick* oats, each imperial bushel of the weight of 39*lbs.* and upwards, and each barrel of the weight of 196 *lbs.*: That plaintiffs, after the promise and before delivery, agreed to sell one *Alexander* the same quantity of oats of the same quality, description, weight, and price, and on the same terms, as the oats so agreed to be shipped by defendant; that defendant afterwards shipped 1183 barrels of oats on account of plaintiffs as and for prime, well-prepared *Limerick* oats of the weight in that behalf mentioned as aforesaid; and plaintiffs then accepted and paid defendant for the same at the price and on the terms above mentioned, and afterwards delivered them to *Alexander* in performance of their agreement with him. Breach, that the oats so shipped by defendant were not at the time of shipment prime, well-prepared *Limerick* oats, &c., but of inferior quality and weight; that *Alexander*, to whom plaintiffs had sold them, refused to pay the price agreed upon, but paid a less sum by 200*l.*, whereby plaintiffs lost the difference.

Pleas. 1. Non assumpsit. 2. Denial of the employment of plaintiffs by defendant. 3. Denial that plaintiffs guaranteed to defendant payment for the oats. 4. Denial that defendant shipped the oats on account of the plaintiffs. 5. Denial of the breach.

On

On the trial before Lord *Denman* C. J., at the *London* sittings after *Michaelmas* term, 1837, it appeared that the plaintiffs were brokers in *London*, who had received from the broker and correspondent of the defendant, a corn-merchant at *Limerick*, the following letter of instructions.

“ You may sell for account of my brother, Mr. *T. M. Usborne*, of *Limerick*, 1000 barrels of prime, well-prepared *Limerick* oats of 39 to 40 lbs., at 9s. 6d. per barrel of 196 lbs., free on board, less your commission of 2½ per cent., and sixty days’ interest, and to be shipped with all possible dispatch at the lowest current freight of the day. Freight not to exceed 2s. 10d. and primage. Yours,” &c.

The plaintiffs thereupon contracted to sell the oats as above described to one *Alexander*. The contract of sale to him was in the following terms: “ Sold for account of *T. M. Usborne* Esq., by order of Messrs. *Usborne*” (the brother of defendant), “ 1000 to 1200 barrels of prime, well-prepared *Limerick* oats,” &c., describing them as in the instructions of the defendant. The name of *Alexander* did not appear in this contract, which was enclosed in a letter from the plaintiffs to the defendant, beginning thus: — “ Messrs. *T. Usborne and Sons* have this day ordered us to sell for your account about 1000 barrels of prime *Limerick* oats, which we have now the pleasure to advise having effected as per annexed contract, which we trust will meet your approval,” &c. The invoice sent to the plaintiffs was headed “ Invoice of oats shipped per *Hinde and Ardwell* for account of Messrs. *Johnston and Co.*,” and was inclosed in a letter by the defendant in these terms: “ Annexed I hand you invoice of goods as per your contract.”

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1840.

 JOHNSTON
against
USBORNE.

1840.

JOHNSTON
against
USBORNE.

“This will authorise my factors Messrs. *T. Usborne and Son* to draw upon you for amount of invoice for my account.”

Upon the arrival of the oats, *Alexander* complained that they did not correspond with the description in the contract. Notice of this complaint was forwarded by the plaintiffs to the defendant, who was requested by the former to appoint some one to act for him in the business. The defendant refused to do so, and denied the inferiority of the oats; whereupon two referees were named by the plaintiffs and *Alexander* to examine the oats, who reported that they were not agreeable to the contract. The difference of value, amounting to 50*l.*, was then paid by the plaintiffs to *Alexander*.

In the course of the trial, it was proved, on the part of the plaintiffs, that they were del credere agents; that the usual practice was for the purchaser to pay the broker, who paid over to the shipper; and evidence was tendered of a custom in the *London* corn market, for brokers, selling on behalf of principals residing out of *England*, to become parties to the contracts of sale in their own names, and make themselves liable to the vendees as principals. It was contended that, such being the known usage of the trade, the defendant was bound to supply the plaintiffs with an article which they might safely sell on their own responsibility upon the same terms. The Lord Chief Justice rejected the evidence as tending to contradict the express terms of the authority, and nonsuited the plaintiffs on the ground that they had made themselves principals without the authority of the defendant, that they had incurred their loss by such unauthorised dealing with the goods, and that there was nothing whence to imply a contract or guarantee,

as between them and the defendant, of the nature stated in the declaration.

1840.

JOHNSTON
against
USBORNE.

Crowder, in the following term, obtained a rule nisi for a new trial upon the rejection of the evidence so tendered. In *Trinity* term last (*a*),

Sir *John Campbell*, Attorney General, and *Ogle* shewed cause. The evidence of custom was inadmissible. The written documents shew that the defendant was the seller, and the plaintiffs only his agents for sale; whereas the evidence tendered would have converted the plaintiffs into purchasers from the defendant. The plaintiffs may have unnecessarily made themselves personally liable to *Alexander*; but it does not follow that the defendant is liable over to them. They might have sold, as they ought to have sold, in the name of the defendant, who would then have become liable to *Alexander* for the alleged breach of contract; but they cannot, by their own unauthorised acts, raise an implied warranty between themselves and the defendant. If the plaintiffs were the buyers, then they would have been the losers in the event of a loss on the passage out to *England*; but it is clear that they would have successfully resisted an attempt to fix them with such a loss by shewing themselves to be mere agents. It may be said that the invoice treats the shipment as made "for account of *Johnston and Co.*;" but this form was necessarily adopted, because the defendant was ignorant of the name of his vendee; so that no inference can be drawn from it. *Meres v. Ansell* (*b*) and a series of other

(*a*) June 8th, 1839. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js.

(*b*) 3 *Wils.* 275.

1840.

JOHNSTON
against
USBORNE.

cases have settled the rule, that parol evidence cannot be admitted to contradict the contract, though it may explain it or give it a technical meaning different from the ordinary one. *Young v. Cole* (a) was referred to as favourable to the admission of the evidence. But there the proof of the personal liability of brokers on contracts for the sale of foreign stock was not repugnant to any other written evidence. *Magee v. Atkinson* (b) is in point. There a broker, who sold as principal, was not permitted to shew a custom for brokers to sell in their own names, and thereby to defeat his personal liability to the vendee. Even if the evidence of custom had been admitted, it would have been irrelevant; for a custom to sell in the broker's own name will not tend to prove an implied guarantee of quality as between the principal and broker. Besides, a custom of the *London* market cannot affect a sale of oats by a *Limerick* merchant. If any action lies at all, it should be for money paid, as in *Young v. Cole* (a), upon an implied contract to indemnify.

Crowder, contra. There is no contradiction between the written authority and the custom; for the plaintiffs admit that they could only sell on account of the defendant, but contend that they could sell, and, in the ordinary course of such dealing, ought to sell, in their own names. They are middle men between the consignor and the vendee, and are alone looked to by both. The *Irish* merchant, who avails himself of an *English* factor in the *London* market, must be supposed to know, and to acquiesce in, the invariable usage in that market, and must therefore impliedly guarantee to his factor the quality of the goods which the factor will have to sell on

(a) 3 *New Ca.* 724.(b) 2 *M. & W.* 440.

his

his own personal responsibility and on the faith of the representation made to him. [*Patteson J.* The declaration does not state a contract of indemnity, but a contract that the oats shall be of a certain quality. If that statement be true, the action would have lain, for nominal damages at least, although *Alexander* had accepted without objection, and paid for, inferior oats.] The contract alleged is not a sale to the plaintiffs, but a promise to send them goods of a certain quality to be sold by them for the defendant. This is a promise created by the dealing between the parties, coupled with the alleged custom to sell in the factor's name. [*Lit- tledale J.* If the plaintiffs are factors, they do not want a custom to sell in their names. *Patteson J.* Suppose my agent sells my horse with a warranty in his own name, and is sued for a breach of it; can he afterwards sue me as on a warranty by me to him?] If the agent was authorised to warrant, and also to sell in his own name, he will be entitled to recover over the damages occasioned by the misrepresentation. Parol evidence of custom to control the language of certain contracts has been allowed in cases stronger than this. In *Dickinson v. Lilwall* (a) a general authority to sell was restricted by usage to the period of a single day. In *Vallance v. Dewar* (b) a policy was held to contemplate the usage of the trade in which the ship was engaged. *Bold v. Rayner* (c) and *Hutton v. Warren* (d) illustrate the same principle. In *Heisch v. Carrington* (e) a remarkable custom

1840.

 JOHNSTON
against
USBORNE.
(a) 4 *Camp.* 279.(b) 1 *Campb.* 503.(c) 1 *M. & W.* 343. *S. C. Tyrwh. & Gr.* 820.(d) 1 *M. & W.* 466. See p. 475. *S. C. Tyrwh. & Gr.* 646.(e) 5 *C. & P.* 471.

HEISCH against CARRINGTON.

AFTER the verdict for the defendants as reported in 5 *Car. & P.* 471, affirming the custom, Sir *J. Campbell*, Solicitor general, in *Easter term*

1833,

1840.
 ———
 JOHNSTON
 against
 USBORNE.

custom in the *London* corn market was admitted in evidence and found by the jury, according to which the seller was held bound by a payment made to his factor before the time for payment had expired, although the money never found its way into the seller's hands.

Cur. adv. vult.

Lord DENMAN C. J., in this term (23d *January*), delivered the judgment of the Court.

1833, obtained a rule nisi for a new trial. Cause was shewn in *Michaelmas* term (November 13th) 1833, and the Court made the rule absolute, thinking it desirable that the alleged custom should be more fully enquired into, and that the attention of a jury should be more particularly called to the question whether the defendants, when paying the factor, believed him to be the owner. The cause was tried again at *Guildhall* after *Hilary* term 1834, before Lord Denman C. J. His lordship left it to the jury whether, from the prevalence of the custom, both parties must be supposed to have known that they were dealing on the terms of such custom. Verdict for defendants. In *Easter* term, 1834, *Follett* obtained a rule nisi for a new trial on the ground that the verdict was against evidence. In *Easter* term 1835 (*April* 27th, before Lord Denman C. J., *Littledale, Patterson and Coleridge* Js.), *Platt* and *R. F. Richards* shewed cause, and Sir *W. W. Follett* and *Crowder* supported the rule.

Cur. adv. vult.

Lord DENMAN C. J., in *Trinity* term following (*June* 4, 1835) delivered the judgment of the Court. It appears to us that in this case there was really no evidence at all of the custom, nor of any authority from the plaintiff to *Gibson* to receive the money before the expiration of the credit, nor of the plaintiff allowing *Gibson* to deal with the barley as his own. *Gibson* did not know of one single instance in which the custom had been acted on with the knowledge of the principal: he had never received any money upon sales for the plaintiff before the time except in two instances; and in both the plaintiff was consulted before the money was received, and the money paid over to him directly: and, as to the last point, all the world knew him to be factor. The argument that the plaintiff had recognised this payment, because the money was handed over to him, and went in reduction of *Gibson's* debt to him, was not much pressed. Obviously there is no difference, for the purpose of this question, between a payment to the plaintiff, and a payment to any other creditor of the factor.

Rule absolute.

His

His Lordship, after shortly stating the facts, and the evidence rejected at the trial, proceeded thus.

After fully considering the case, it appears to all of us that the plaintiffs, though uniformly styled brokers during the trial, were more in the nature of factors. They certainly were *del credere* agents. The goods were sent and invoiced to them, and they guaranteed the price; and it is difficult to say that they might not be authorised to sell in their own names. The written authority was indeed read in evidence, to sell *on account of the defendant*; but it does not follow that they were restricted to selling in the defendant's name. The expression appeared less strong in support of that view than the state of things was in support of the contrary opinion. If so, the evidence of a custom might be unnecessary; and I avow my great reluctance to admit that kind of evidence to vary the effect of any written document. *Hutton v. Warren* (a) was urged in support of the rule, where *Parke B.* gave the judgment of the Court of Exchequer in favour of engrafting on a lease a stipulation implied from the custom of the country. But he most cautiously confines the decision to that peculiar relation; and in *Magee v. Atkinson* (b) the same learned Judge repudiated, as strongly as this Court did in *Jones v. Littledale* (c), the principle of varying contracts by custom of trade.

But that contracts may be explained by that evidence has never been denied; and we are not prepared to say that the custom of *London* might not have a reasonable influence on the minds of the jury towards fixing the sense of the broker's authority, if in itself doubtful.

(a) 1 M. & W. 466. As to commercial transactions, see *ib.* p. 475. *S. C. Tyrwh.* § Gr. 646. See judgment of *Tindal C. J.* in *Whittaker v. Mason*, 2 New Ca. 369, 370.

(b) 2 M. & W. 440.

(c) 6 A. & E. 486.

1840.

JOHNSTON
against
USBORNE.

The

1840.

Jones v.
against
Usborne.

The rule, therefore, for setting aside the nonsuit and granting a new trial must be absolute.

Rule absolute for new trial (a).

(a) See *Sutton v. Tatham*, 10 A. & E. 27.; *Trueman v. Loder*, post. p. 589.

The QUEEN against The Poor Law Commissioners for ENGLAND and WALES.

(ALLSTONEFIELD Incorporation.)

Is a Poor law union formed under *Gilbert's Act*, 22 G. 3. c. 83., the commissioners under stat. 4 & 5 W. 4. c. 76. may, by sect. 46, direct the appointment of an auditor for the union, to audit the accounts of the incorporation and of its several parishes at proper periods; to examine into the expenditure and allow or disallow charges; and

RULE, in *Hilary* term, 1839, obtained a rule calling on the Poor Law Commissioners to shew cause why a certiorari should not issue to remove into this Court certain orders issued by them, directed to the Visitors and Guardians of the poor of the *Allstonefield* incorporation, *Staffordshire*, purporting to be made in pursuance of stat. 4 & 5 W. 4. c. 76.

The *Allstonefield* incorporation, consisting of forty-two parishes and townships, was formed in 1818, under *Gilbert's Act*, 22 G. 3. c. 83., and had ever since been managed by guardians according to that act. In *March* 1837, the guardians received from one of the assistant Poor Law Commissioners certain printed orders, under

to see that the accounts are properly stated and supported by vouchers, and all sums received, or which ought to have been received, brought into account; with power, in case the accuracy of any account shall be doubted, to compel the appearance of persons and production of documents.

They may also appoint a clerk (with a salary) to attend meetings of the guardians, keep minutes of their proceedings, conduct their correspondence, communicate orders from the Commissioners and guardians to the persons administering relief within the union, give instructions for executing such orders, and report neglects &c.; and to keep a book of monies received and paid, orders and checks given, accounts passed, and salaries ordered to be paid, by the board of guardians; to make up and balance the union accounts, and abstract them quarterly, &c.; to assist the auditor in making a quarterly abstract of the accounts of each parish; and to revise the accounts of the master of the poor-house.

But they cannot direct that such clerk shall, as a part of his duties, "prepare or superintend the preparation, and take measures for ensuring the prompt and correct return, of all such statistical information and reports as may be required for the public service."

And an order for the government of an incorporation, containing such a clause, is altogether void.

the

the hands and seal of the Commissioners, for the administration of the poor laws within the incorporation.

By the orders, dated *March* 13th, 1837, the guardians were directed, at their first meeting in *April* then next, and annually, to elect a chairman and vice-chairman; rules were laid down for conducting the business of their meetings; and they were ordered, subject to the approbation of the commissioners, to appoint a sufficient number of persons to perform the duties after specified to belong to certain officers, among whom were named a Clerk to the guardians, and an Auditor; and such assistants and servants as the guardians should deem necessary for the efficient performance of the duties of such officers. The guardians were directed to allow the clerk, and the assistants and servants, such salary and remuneration as they might think proper, subject to the approval of the commissioners. The clerk, if an attorney, was to undertake, in consideration of his salary as clerk, to do the legal business connected with the incorporation.

The particular "duties of the clerk," as specified in the order on that head, were, to attend the meetings of the guardians, enter minutes of proceedings &c.; keep minutes of business deferred, and submit them to the guardians; conduct their correspondence; keep letters and copies &c., and all books and documents in convenient order for reference, direct service of notices, communicate orders of the commissioners or guardians to the persons engaged in the administration of relief within the incorporation, give requisite instructions for the execution of such orders, and examine and report on any neglect &c. therein, which might come to his knowledge; to take down the names of guardians

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

1840.

—
 The *Queens*
against
 The Poor Law
 Commissioners.
Allan v. The Poor Law
Incorporation.

guardians attending at meetings, and of those sending substitutes &c., and of the substitutes, and the alleged reasons for non-attendance, and the names of guardians incurring penalties under stat. 22 G. 3. c. 63. s. 26. : and “to prepare or superintend the preparation, and take measures for ensuring the prompt and correct return, of all such statistical information and reports as may be required for the public service.”

The qualification of the auditor was to be, holding office as auditor in some union formed under the Poor Law Amendment Act: his duties were, “1. To audit the accounts of the incorporation, and of the several parishes comprised therein, at proper periods. 2. To examine whether the expenditure in all cases is such as might lawfully be made, and to strike out such payments and charges as are not authorised by some provision of the law, or by virtue of the orders, rules, and regulations of the Poor Law Commissioners. 3. To see that the accounts are presented in the proper form, and that the particular items of receipt and expenditure are stated in detail, and supported by adequate vouchers of receipt and authority for payments, and that all sums received, or which ought to have been received, are brought into account.”

Additional directions were given to the clerk, to keep a minute-book, containing minutes of monies received and paid, orders and checks given, accounts examined and allowed, salaries ordered to be paid, and all other business, proceedings, &c., of the board of guardians; also to keep a ledger, order-check-books, pauper-description-book, &c. (of which forms were given); to make up and balance the union accounts quarterly, submit them to the auditor, and send them to the commissioners;

to

to prepare quarterly abstracts of such accounts, deposit them for inspection, and furnish abstracts to the parish officers, assist the auditor in making a quarterly abstract of the separate accounts of each parish, and transmit it, when allowed by the auditor and signed by the chairman of the guardians, to the Poor Law Commissioners &c., and to revise and check certain accounts and entries directed in that order to be kept by the master of the poor-house. Directions were also given to the auditor as to the time and manner of auditing the accounts, which was to be done quarterly, giving notice to the clerk, treasurer, and parish officers. In auditing the accounts, the auditor was to see that they were presented in proper form &c. (as before stated in the enumeration of his duties); to examine the legality of the items, and strike out or reduce improper ones; to ascertain the accuracy of such accounts, and verify them by his signature: and to receive, examine into, and decide upon, the objections of any rate-payer to the accounts, or any item therein &c. Powers were given him to inquire into the accuracy of any account or charge as to which doubt should arise, and to compel the appearance of persons, and production of books and papers: and, if he should be of opinion that money, goods, &c., had been embezzled or misapplied by any officer or person accounting, he was to collect evidence of the value, surcharge the person with it in his account, and report the particulars to the board of guardians. He was also to correct and sign the quarterly abstracts, and report to the commissioners any facts which he might deem important to the interests of the incorporation. Schedules were annexed to the orders, shewing the manner in which the accounts were to be kept, the quarterly abstracts made, &c.

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

The

1840.

**The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.**

The guardians refused to elect officers according to the orders: and the present rule was obtained for the purpose of causing them to be quashed. The affidavits in support of the rule stated that the poor laws had been satisfactorily administered by the guardians under *Gilbert's Act*, and that by adopting the orders an additional expense, as was believed, of 400*l.* per annum would be incurred without any corresponding benefit: That, for many years past, a visitor, appointed under *Gilbert's Act*, had performed the duties of that office, and the accounts relating to the poor had been satisfactorily kept by a treasurer whose salary was 6*l.* per annum, and audited and examined by the visitor according to the statute: and that the treasurer had attended the monthly meetings of the guardians, and made and kept the entries and minutes of the business without expense to the incorporation. Affidavits were filed on the other side, contradicting some of these statements.

In *Michaelmas* term, 1839, the rule coming on for discussion, *Erle* (by desire of the Court) stated the objections to the orders, which were:— That they would, in effect, supersede the whole system introduced under stat. 22 *G. 3. c. 83.* by a new set of regulations: That the intention in stat. 4 & 5 *W. 4. c. 76.*, as appeared by sects. 21, 22, was to preserve (though under controul of the commissioners) the unions established in pursuance of *Gilbert's Act*; which design was further shewn by sect. 29, and the repeal, in part only, of *Gilbert's Act* in sect. 31: That, in particular, the appointment of a clerk to the guardians, and an auditor, with the powers and duties mentioned in these orders, would leave nothing to be done by the visitor under sect. 10 of *Gilbert's*

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Act: That the orders went into a minuteness of detail which was objectionable, at least in the case of an incorporation already established; and that the preparation of the accounts and abstracts, as directed, would be expensive, and would require qualifications in the auditor and clerk which had not been necessary for the transaction of business under *Gilbert's Act*: And that the duty imposed on the clerk of preparing and returning statistical information was new, and could not legally be exacted. On the following day (*a*),

1840.

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The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

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1840.

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The QUEEN
against
The Poor Law
Commissioners,
ALLSTONFIELD
Incorporation.

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sidered as having reference to the alterations introduced in many particulars by stat. 4 & 5 W. 4. c. 76.; as, for instance, the restriction (by sect. 89) on payments by the overseers and guardians, which thenceforward required a more effectual check; and the additional duties of registration and keeping accounts, imposed on masters of workhouses and overseers by sect. 55.

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

Erle and Whateley, contra. This order, if valid, must virtually abolish the provisions of *Gilbert's Act* as to the appointment and functions of officers and the details connected with them. The auditor is a new officer, whose power may in various cases be exerted so as to conflict with that of the guardians. In the case of the *Holborn Union* the board was nominated under stat. 4 & 5 W. 4. c. 76., and not under *Gilbert's Act*; and the circumstances of the case in other respects make it inapplicable. The functions here assigned to the clerk comprise an extent of duties, and a complication of checks, which the commissioners have no right to demand; the system imposes new and unreasonable expense, and supersedes the discretion of the guardians. The large construction put by the commissioners on sects. 15 and 42 leaves sect. 21 almost without effect, so far as it preserves existing powers. The authority claimed, of changing the entire system of administration in unions under *Gilbert's act*, is inconsistent with the provisions of sect. 42 which give power in express terms to make changes of a more limited scope, and with reference merely to workhouses. The enactment of sect. 37, that in future no union shall be formed under *Gilbert's Act*, without consent of the commissioners, also suggests

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

an inference that they are not at liberty to alter essential regulations in the unions already formed. Sect. 46 gives authority to direct the appointment of officers, for "carrying the provisions of *this act* into execution," not therefore where the provisions to be carried into execution are those of *Gilbert's Act*. [Coleridge J. The beginning of the clause has the words "Overseers or guardians of any parish or union:" the word "Union" must have some meaning; and there appears no reason for confining it to future unions.] The duty of *keeping accounts* is not one mentioned in that clause. The kind of power here assumed, of regulating the affairs of the union by a new machinery, was restrained by this Court in *Regina v. The Poor Law Commissioners, In the Matter of the Cambridge Union (a)*; and much of the reasoning which prevailed there is applicable to this case.

Cur. adv. vult.

Lord DENMAN C. J. in this term, *January 31st*, delivered the judgment of the Court.

This was a rule obtained by the *Allstonefield* corporation to try the validity of an order of the Poor Law Commissioners; and the principal objections to it were founded on those parts which directed the appointment of an auditor and clerk. The corporation was formed under *Gilbert's Act*, 22 G. 3. c. 83., and included under its management forty-two parishes. It was not disputed that the authority of the commissioners extended to direct the appointment of such officers as those above named in unions formed by themselves; but it was urged that stat. 4 & 5 W. 4. c. 76. expressly saved the

(a) 9 A. & E. 911.

operation

operation of stat. 22 G. 3. c. 83. in all matters not specifically altered or subjected to the controul of the commissioners, and that the appointments in question fell within that rule, and were also inconsistent with the provisions of 22 G. 3. c. 83.

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONFIELD
Incorporation.

Under that act the overseers (*a*) of each parish within the union pay to the treasurer of such union, out of the poor-rate, the parish quota towards the expenses attending the poor and the poor house: the treasurer (*b*) disburses this money under the orders of the guardians; and an officer, called the visitor (*c*), settles and adjusts the accounts between the guardians and the treasurer, "if any question or dispute shall arise respecting the same." In addition to this, one of two accounts which by sect. 24 the treasurer is to submit to the guardians monthly, an account, namely, "of the victuals, beer, firing, and other necessities," for the use and maintenance of the poor, and of the governor, at the house, "and all other incidental expenses," must, after it has been agreed to and signed by the guardians, be inspected by the visitor, *if not a guardian*, and allowed by him if he shall approve thereof. The treasurer is also, by sect. 12, to make out an annual account of the expenses of the union house and the earnings of the inmates, which is to be laid before the visitor, and signified under his hand if he approves the same, and submitted to the quarter sessions for their inspection.

These are the provisions made by the act for the discharge of the duties of an auditor: and we cannot but think that, even with reference to the expenditure under the former system for the relief of the poor, these pro-

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(b) Sect. 12.

(c) Sect. 10.

1840.

**The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.**

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But, whatever might have been thought of the sufficiency of the visitor as an auditor before the recent change in the poor law, as the guardians are now to execute their duties "under the controul, and subject to the rules, orders, and regulations" of the Poor Law Commissioners (stat. 4 & 5 W. 4. c. 76. s. 21.), and as their expenditure and mode of accounting have been, by some of such rules, which are unquestionably binding, placed under new restraints, a necessity has arisen for an inspection and audit of their accounts, which it is certain the visitor has no authority to institute. If, therefore, the Commissioners have the power to direct the appointment of any officers in such a union, no one can doubt the propriety of their doing so in the case of an auditor. The forty-sixth section has words large enough to extend to this union, and in terms embraces the case of an officer for the auditing, allowing, or disallowing of accounts. Nor is there any thing in this inconsistent with the provisions of *Gilbert's Act*. The
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guardians are, indeed, subjected to a new controul, and are subjected to new duties; but this arises from the express provisions of the twenty-first section. These duties occasion a necessity for an auditor: the former visitor will continue to perform his duty, but is incompetent to the discharge of that of auditor; and the commissioners supply the want under the authority given them by the forty-sixth section. The order in question, therefore, seems to us free from all objection on this head.

As an auditor is clearly a proper officer in such a union as that under consideration, so it is impossible to read the order in question, which regulates for the future the manner in which the guardians are to manage its affairs, without feeling that it is necessary for them to have the assistance of an intelligent clerk. It is stated that at present the treasurer discharges the duties of that office, not by virtue of any independent appointment as clerk, but as treasurer under the *Gilbert Act*. We turn, therefore, to the twelfth section of the act, which defines his duties: but these are confined to the receipt and payment of moneys, and the keeping of accounts such as we have before stated. We may form some notion of the amount of his contemplated labours from the fact that the section limits his salary to 10*l.* a year. It is clear that this is not such a clerk as is now necessary, and equally so that the commissioners have authority to appoint such an officer in this union. The order describes his duties; and they make it clear that he is assisting in the administration of the relief and employment of the poor, and in otherwise carrying the provisions of the New Poor Law Act into execution.

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

If, therefore, he had been appointed for the discharge only of duties which fell within this definition, we should have thought that the order was free from objection on this head also: but we regret to find that other duties are imposed upon him which appear to us clearly to go beyond the limits of the Poor Law Amendment Act: and it has not been suggested to us that the Commissioners derive authority from any other source to impose them. The most obvious of these are specified in Rule 5.: the preparing or superintending the preparation, and taking measures for ensuring the prompt and correct return, of all such statistical information and reports as may be required for the public service. This may be in itself very desirable; but it must lead to expense, in the way of salary and contingencies, which the Commissioners have no right to impose on the parishes forming the union, and is too remotely and indirectly, if at all, connected with the object of the Poor Law Amendment Act to be within their jurisdiction.

Upon this ground we think the order, which is entire, cannot be supported. And we have said so much on the former objection, which we hold to be untenable, as well as on this which we sustain, for the purpose of pointing out in what way we think the jurisdiction of the Commissioners may be legally as well as profitably exercised within the union; which we should hope would lead to an accommodation between them and the officers of the union.

Rule absolute (a).

(a) See also, as to the powers of the commissioners under stat. 4 & 5 W. 4. c. 76. s. 46., *Regina v. The Guardians of the Braintree Union*, *Hil. T. 1841. post.*

1840.

MAGOR and Others *against* CHADWICK and Others.

CASE. The declaration stated that plaintiffs were lawfully possessed of certain buildings, brewery, and premises at *Redruth*, in the county of *Cornwall*, and, by reason thereof, of right had and enjoyed the benefit and advantage of the waters of a certain stream which had been used, and of right ought, to run and flow unto and into the said buildings, brewery, and premises without interruption, fouling, or annoyance, to supply the same with water for working, using, and enjoying the brewery, and for brewing beer there, and for other necessary purposes. Breach, that defendants wrongfully fouled and polluted the water of the said stream which flowed unto and into the said premises, and thereby rendered it impure and unfit for working, using, and enjoying the brewery, and for brewing beer there, and for other necessary purposes; whereby plaintiffs were injured in their business of brewers, and were unable to brew beer in so large and beneficial manner as they had theretofore done.

Pleas. 1. Not Guilty. 2. That plaintiffs at the time when &c. ought not of right to have had or enjoyed the benefit or advantage of the waters of the said stream, nor have the same been used to run and flow, nor of right ought they to run and flow unto and into the

In the absence of a special custom, artificial water-courses are not distinguished in law from natural ones; and a title may be gained by twenty years user, as well to the former as the latter.

Therefore, where mine owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing: Held, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it.

Quære, whether a universal practice in the neighbourhood to resume the use of such adit waters, for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby raising the inference, that the party claiming used the water, not of right, but only during the accidental disuse of the adit, and with knowledge that the mine owners reserved to themselves a power to recommence working, and thereby disturbing the waters.

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1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

The guardians refused to elect officers according to the orders: and the present rule was obtained for the purpose of causing them to be quashed. The affidavits in support of the rule stated that the poor laws had been satisfactorily administered by the guardians under *Gilbert's Act*, and that by adopting the orders an additional expense, as was believed, of 400*l.* per annum would be incurred without any corresponding benefit: That, for many years past, a visitor, appointed under *Gilbert's Act*, had performed the duties of that office, and the accounts relating to the poor had been satisfactorily kept by a treasurer whose salary was 6*l.* per annum, and audited and examined by the visitor according to the statute: and that the treasurer had attended the monthly meetings of the guardians, and made and kept the entries and minutes of the business without expense to the incorporation. Affidavits were filed on the other side, contradicting some of these statements.

In *Michaelmas* term, 1839, the rule coming on for discussion, *Erle* (by desire of the Court) stated the objections to the orders, which were:— That they would, in effect, supersede the whole system introduced under stat. 22 G. 3. c. 83. by a new set of regulations: That the intention in stat. 4 & 5 W. 4. c. 76., as appeared by sects. 21, 22, was to preserve (though under controul of the commissioners) the unions established in pursuance of *Gilbert's Act*; which design was further shewn by sect. 29, and the repeal, in part only, of *Gilbert's Act* in sect. 31: That, in particular, the appointment of a clerk to the guardians, and an auditor, with the powers and duties mentioned in these orders, would leave nothing to be done by the visitor under sect. 10 of *Gilbert's*

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The QUEEN
against
The Poor Law
Commissioners.
ALLSTONFIELD
Incorporation.

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The QUEEN
against
The Poor Law
Commissioners,
ALLATONFIELD
Incorporation.

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1840.

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The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

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1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

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1840.

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The QUEEN
against
The Poor Law
Commissioners.
ALLSTONFIELD
Incorporation.

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These are the provisions made by the act for the discharge of the duties of an auditor: and we cannot but think that, even with reference to the expenditure under the former system for the relief of the poor, these pro-

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1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONFIELD
Incorporation.

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But, whatever might have been thought of the sufficiency of the visitor as an auditor before the recent change in the poor law, as the guardians are now to execute their duties "under the controul, and subject to the rules, orders, and regulations" of the Poor Law Commissioners (stat. 4 & 5 W. 4. c. 76. s. 21.), and as their expenditure and mode of accounting have been, by some of such rules, which are unquestionably binding, placed under new restraints, a necessity has arisen for an inspection and audit of their accounts, which it is certain the visitor has no authority to institute. If, therefore, the Commissioners have the power to direct the appointment of any officers in such a union, no one can doubt the propriety of their doing so in the case of an auditor. The forty-sixth section has words large enough to extend to this union, and in terms embraces the case of an officer for the auditing, allowing, or disallowing of accounts. Nor is there any thing in this inconsistent with the provisions of *Gilbert's Act*. The guardians

guardians are, indeed, subjected to a new controul, and are subjected to new duties; but this arises from the express provisions of the twenty-first section. These duties occasion a necessity for an auditor: the former visitor will continue to perform his duty, but is incompetent to the discharge of that of auditor; and the commissioners supply the want under the authority given them by the forty-sixth section. The order in question, therefore, seems to us free from all objection on this head.

As an auditor is clearly a proper officer in such a union as that under consideration, so it is impossible to read the order in question, which regulates for the future the manner in which the guardians are to manage its affairs, without feeling that it is necessary for them to have the assistance of an intelligent clerk. It is stated that at present the treasurer discharges the duties of that office, not by virtue of any independent appointment as clerk, but as treasurer under the *Gilbert Act*. We turn, therefore, to the twelfth section of the act, which defines his duties: but these are confined to the receipt and payment of moneys, and the keeping of accounts such as we have before stated. We may form some notion of the amount of his contemplated labours from the fact that the section limits his salary to 10*l.* a year. It is clear that this is not such a clerk as is now necessary, and equally so that the commissioners have authority to appoint such an officer in this union. The order describes his duties; and they make it clear that he is assisting in the administration of the relief and employment of the poor, and in otherwise carrying the provisions of the New Poor Law Act into execution.

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

1840.

The QUEEN
against
The Poor Law
Commissioners.
ALLSTONEFIELD
Incorporation.

If, therefore, he had been appointed for the discharge only of duties which fell within this definition, we should have thought that the order was free from objection on this head also: but we regret to find that other duties are imposed upon him which appear to us clearly to go beyond the limits of the Poor Law Amendment Act: and it has not been suggested to us that the Commissioners derive authority from any other source to impose them. The most obvious of these are specified in Rule 5.: the preparing or superintending the preparation, and taking measures for ensuring the prompt and correct return, of all such statistical information and reports as may be required for the public service. This may be in itself very desirable; but it must lead to expense, in the way of salary and contingencies, which the Commissioners have no right to impose on the parishes forming the union, and is too remotely and indirectly, if at all, connected with the object of the Poor Law Amendment Act to be within their jurisdiction.

Upon this ground we think the order, which is entire, cannot be supported. And we have said so much on the former objection, which we hold to be untenable, as well as on this which we sustain, for the purpose of pointing out in what way we think the jurisdiction of the Commissioners may be legally as well as profitably exercised within the union; which we should hope would lead to an accommodation between them and the officers of the union.

Rule absolute (a).

(a) See also, as to the powers of the commissioners under stat. 4 & 5 W. 4. c. 76. s. 46., *Regina v. The Guardians of the Braintree Union*, *Hil. T. 1841. post.*

1840.

MAGOR and Others *against* CHADWICK and Others.

CASE. The declaration stated that plaintiffs were lawfully possessed of certain buildings, brewery, and premises at *Redruth*, in the county of *Cornwall*, and, by reason thereof, of right had and enjoyed the benefit and advantage of the waters of a certain stream which had been used, and of right ought, to run and flow unto and into the said buildings, brewery, and premises without interruption, fouling, or annoyance, to supply the same with water for working, using, and enjoying the brewery, and for brewing beer there, and for other necessary purposes. Breach, that defendants wrongfully fouled and polluted the water of the said stream which flowed unto and into the said premises, and thereby rendered it impure and unfit for working, using, and enjoying the brewery, and for brewing beer there, and for other necessary purposes; whereby plaintiffs were injured in their business of brewers, and were unable to brew beer in so large and beneficial manner as they had theretofore done.

Pleas. 1. Not Guilty. 2. That plaintiffs at the time when &c. ought not of right to have had or enjoyed the benefit or advantage of the waters of the said stream, nor have the same been used to run and flow, nor of right ought they to run and flow unto and into the

In the absence of a special custom, artificial water-courses are not distinguished in law from natural ones; and a title may be gained by twenty years user, as well to the former as the latter. Therefore, where mine owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing: Held, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it.

Quære, whether a universal practice in the neighbourhood to resume the use of such adit waters, for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby raising the inference, that the party claiming used the water, not of right, but only during the accidental disuse of the adit, and with knowledge that the mine owners reserved to themselves a power to recommence working, and thereby disturbing the waters.

said

1840.

MAGOR
against
CHADWICK.

said buildings, brewery, and premises without interruption, fouling, or annoyance, to supply the same with water for working &c., in manner and form &c. Issue was joined on both pleas.

The cause was tried before *Patteson J.*, at the *Lancaster* Summer assizes, 1837, when it appeared that the stream or watercourse claimed by the plaintiffs flowed from the mouth of an adit, or underground passage, in adjoining lands not belonging to the plaintiffs, and which had been originally made, upwards of fifty years ago, for the purpose of clearing the water from a certain mine, by the owner of the mine, but that the mine had not been worked for more than thirty years past; that, after the working was discontinued, the plaintiffs availed themselves of the water coming along this channel to brew beer, and, after clearing the adit themselves, had for more than twenty years obtained from it pure water for that purpose, and had erected a brewery there at a great expense. It was admitted that, at the time when the adit was originally made and the mine worked, the water must have been unfit for the uses to which the plaintiffs now applied it.

The defendants were owners of other mines (copper mines), and had lately used the old adit for the purpose of draining them, by which the water had again been made foul and unfit for brewing. It was not shewn that they were connected with, or claimed under, the owners of the adit or mine, or of the lands through which it flowed. The defendants contended that a custom (a) prevailed in *Cornwall*, by virtue of which an
adit,

(a) It was objected, at the trial, that the custom ought to have been replied. On the other hand, it was contended that, such custom being at variance with the supposed absolute enjoyment as of right, evidence of
it

adit, once artificially made for draining a mine, was always an adit, and might at any time be again employed for that purpose; and they adduced evidence in proof of such custom. They also contended that an artificial watercourse was different in its nature from a natural one, and that the same rules of law could not be applied to both. The learned Judge took the opinion of the jury on the evidence of the alleged custom, which they negatived. He also stated to them that, in the absence of custom, artificial watercourses are not distinguished in law from such as are natural; that the same rules apply to them; and that twenty years' enjoyment might therefore warrant the jury in finding in favour of the right. The jury found a verdict for the plaintiffs on both issues.

1840.

MAJOR
against
CHADWICK.

In *Michaelmas* term *Bompas* Serjt. obtained a rule nisi for a new trial, on the ground of misdirection. In *Michaelmas* vacation, 1839,

Sir *W. W. Follett*, *Crowder*, and *Butt* (a) shewed cause. The custom being negatived, the only question is, whether a right can be obtained by user, for twenty years, of the water flowing through an artificial channel. The general proposition that uninterrupted user of a flow of water will establish a right is not disputed; but the defendants contend that an adit, formed artificially for a certain purpose, is not within the rule. The question may be considered with reference to the state of the law before, and since, stat. 2 & 3 *W. 4. c. 71*.

it was admissible on the traverse of the right. *Patteson* J. admitted the evidence, but expressed doubt upon the point.

(a) November 27th. Before Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge* Js.

At

1840.

MAGOR
against
CHADWICK.

At common law, a right of this kind was gained by prescription or grant. Where its prescriptive existence could be disproved, and no grant could be shewn, a series of decisions established the rule that an unexplained user for twenty years was conclusive evidence of a grant; *Balston v. Bensted* (a), *Bealey v. Shaw* (b), *Mason v. Hill* (c), and the authorities cited in the note to *Yard v. Ford* (d). *Arkwright v. Gell* (e) will be relied upon by the defendants: but that case is essentially distinguishable; and there is nothing in it which this Court will be called upon to over-rule except certain dicta not material to the determination. That was a special case, in which the Court were authorised to draw inferences of fact as a jury, and they did accordingly treat the case as one "as much of fact, as of law." In the character of jurors they were perhaps warranted in supposing that the right to the use of water there claimed by the plaintiffs was originally taken, and constantly enjoyed, subject to the right of the proprietors of the mines, for whose benefit alone the sough or stream had been made, and uninterruptedly used. The continued working of the mine was equivalent to a continual act and assertion of ownership. There too the adventurers, who diverted the water, were identified in interest with those who had at first made the channel for it. Here the defendants are mere strangers, not shewn to be in privity with either the owners of the land or the former adventurers. There the Court found that the sough was "of a temporary character, having its continuance only whilst the convenience of the mine owners required

(a) 1 Camp. 463.

(b) 6 East, 208.

(c) 3 B. & Ad. 304. 5 B. & Ad. 1.

(d) 2 W. Saund. 174. n. (2).

(e) 5 M. & W. 203.

it;

it; and in the ordinary course it would most probably cease when the mineral ore above its level should have been exhausted" (a). Here the flow of water from the adit was independent of the use of the mine, which had been long abandoned; it was not of a temporary, but of a permanent, character; and the only question was, whether the plaintiffs were to enjoy it without pollution. It was said in that case that the mine owner could not prevent the enjoyment of the stream by any act of his, except by taking it away altogether; and it appears to have been inferred by the Court that the uninterrupted user of it under such circumstances was no evidence of a grant by him. Here it was easy for those, who were interested in preserving their rights over the adit, to interrupt the enjoyment by fouling the water from time to time, by occasionally obstructing it, or by notice of an intention to do so unless the right was acknowledged.

But, in truth, some of the propositions laid down by the Court in *Arkwright v. Gell* (b) are exceptionable in point of law, and are subversive of the principle on which rights of this kind are founded. The distinction between natural and artificial water-courses, adverted to by the Court, has no foundation. The stream, when discharged from the adit's mouth, pursues its natural course. The flow of all waters, through channels made by art, is itself natural. A farmer drains his field by a gutter, which is conducted to a ditch; the ditch is made to discharge itself into a stream, and the stream irrigates a meadow or turns a mill. The "sole object" of the gutter and ditch is to "get rid of a nuisance;" yet the right to the water,

1840.

MAGOR
against
CHADWICK.

(a) 5 M. & W. 231.

(b) 5 M. & W. 203.

when

1840.

MACON
against
CHADWICK.

when appropriated for a sufficient time by the owner of the meadow or mill, is undeniable. A leat, cut artificially to supply a mill by waters which afterwards turn another mill or water a close below, cannot be so altered, after long user, as to injure them. A window, though wholly artificial, may nevertheless gain for the owner of the house a right to the uninterrupted flow of light and air. It is said (a) that the mine owners could not "have meant to burthen themselves with such a servitude, so destructive to their interests" as a grant, which would, in effect, oblige them to keep their mines constantly flooded, and to abandon their mineral rights. But the Court cannot speculate on the probability of the case, or the actual intention of parties who permit the enjoyment. In *Eldridge v. Knott* (b) Lord Mansfield says that grants are presumed, "not that the Court really thinks a grant has been made," which may be very improbable, but "from a principle of quieting the possession." If, instead of using the water, the plaintiffs had turned out their cattle on the land for twenty years, the landowner could no longer have worked his mines to the injury of the right of common so acquired; yet it is not *probable* that he intended to relinquish his mines for the benefit of the plaintiffs' cattle. So, in ascertaining whether a way or other easement has been acquired, the loss thereby sustained by the owner of the servient tenement is never taken into the account so as to obviate the presumption of law. He may lose the benefit of very valuable building ground by allowing an easement of very trifling value to be established over it. It is said in *Arkwright v. Gell* (a) to be unreasonable that a grant should be presumed merely because a

(a) 5 M. & W. 232.

(b) *Cowp.* 214.

party

party abstains from doing an act, like that of diverting a stream, which would put him to great expense. Yet a right to unobstructed light is often only to be prevented by expensive erections. Whether the expense and trouble of interrupting a growing right be great or small, cannot be taken into consideration. It would destroy the simplicity of the legal rule, and be at variance with first principles. It has been asked whether, if the defendants had for twenty years pumped up the water by a steam-engine, the plaintiffs could have established the right? The answer is, that the defendants are not bound to be active in supplying the stream. They are not compellable to *do* any thing, but only to leave a thing *undone* (a). The case suggested in *Arkwright v. Gell* (b), of water flowing from a neighbour's eaves, and used for domestic purposes, is not in point: it is possible that the law may not support as a right or easement, the casual, intermitting, enjoyment of water in the form of rain. A case was put, in moving for this rule, of a canal company having a reservoir, from which the waste water was suffered to flow over a meadow; and it was asked whether irrigation by such means could become an indefeasible right, so as to prevent the resumption of the water? Doubtless, if such enjoyment has been uninterrupted, adverse, and known to the company, a right may be acquired. In *Brown v. Best* (c) the defendant shewed that the source of the plaintiffs' watercourse was in the defendant's own land, and that he (defendant) had diverted the water by opening certain ancient pits in his land which had been

1840.

 MAGOR
 against
 CHADWICK.

(a) *Servitutum non ea natura est, ut aliquid faciat quis; sed ut aliquid patiatur, aut non faciat.* Dig. viii. 1. xv.

(b) 5 *M. & W.* 232.

(c) 1 *Wils.* 174.

1840.

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MAGOR
against
CHADWICK.

choaked up, yet the Court held the plea bad. That the negligence or inadvertence of the owner occasions the establishment of rights over his land which preclude him from the profitable enjoyment of it, is a thing of frequent occurrence. *Cross v. Lewis (a)* and *Partridge v. Scott (b)* are instances. The latter case shews that a man may, by building on the extremity of his own land, acquire a right to prevent his neighbour from digging a mine in his. Here rights are acquired on both sides. The advantages are reciprocal. The defendants have gained a right to discharge the water through the adit over the plaintiffs' land; and the plaintiffs have acquired a right to use it in its passage over their land, in the same state in which they have enjoyed it for twenty years past. The defendants have now no more right to disturb the water than the plaintiffs have to pen it back upon the defendants on the ground that they want it no longer, and never intended always to continue brewing.

If, however, there was any doubt before 2 & 3 W. 4. c. 71., that statute has removed it. In *Arkwright v. Gell (c)* it appears to have been the opinion of the Court that the act applies only to cases where a grant would before have been presumed. The preamble however shews that the object was to shorten the period of legal prescription, and to make it unnecessary to go back to the reign of *Richard I.* Twenty years' user was before only evidence; *Rex v. Joliffe (d)*, *Jenkins v. Harvey (e)*. It is now a title in itself, and after forty years, an indefeasible one, unless a written origin be

(a) 2 B. & C. 686.

(b) 3 M. & W. 220.

(c) 5 M. & W. 203.

(d) 2 B. & C. 54.

(e) 1 C. M. R. 877. 2 C. M. & R. 393. S. C. 5 Tyrwh. 32 b., 871.

shewn

shewn for it. The necessity for resorting to the fiction of a grant is at an end; and all enquiry about the probability of one is superfluous and irrelevant. It has been suggested that the use of water cannot be "of right" if it be not the subject of an action, nor capable of interruption "by any reasonable mode" (a). But rights may be gained by acts which are perfectly legal, as by opening a window; and it is difficult to conceive a right incapable of interruption. The reasonableness of the means of interruption cannot be taken into consideration. The words "of right" mean *proprio vigore*, without leave or licence, or any payment or acknowledgment of an adverse title. Their import has been settled by several decisions; amongst others, by *Tickle v. Brown* (b); *Bright v. Walker* (c); *Monmouth Canal Company v. Harford* (d); and *Beasley v. Clarke* (e). The statute operates where no valid grant could before have been presumed; as where the tenement, subjected to the easement, is entailed; or, in the case of forty years user, where the tenant is under absolute disability to make any grant at all; sect. 7. It is fallacious to assume that the legislature has interposed its protection in aid only of titles presumably good in their origin. It rather supplies a title which would be clearly wanting without it. This is the object of all statutes of Limitation, which would be defeated if the doctrine of presumed intention were to be admitted.

1840.

MAGOR
against
CHADWICK.

Bompas Serjt. and *Erle*, contra. Water flowing through an adit or artificial aperture cannot be made

(a) See *Arkwright v. Gell*, 5 M. & W. 233.

(b) 4 A. & E. 369. (c) 1 C. M. & R. 211. S. C. 4 Tyrwh. 502.

(d) 1 C. M. & R. 614. S. C. 5 Tyrwh. 68.

(e) 2 New Ca. 705.

1840.

MASON
against
CHADWICK.

the subject of such a right as that claimed by the plaintiffs. An adit is applicable to the drainage, not of one mine only, but of a mineral district, the whole of which has, in this case, been uninterruptedly receiving benefit from it. The use of it did not cease upon the temporary abandonment of the works for which it was originally made, but still continues. [*Patteson J.* The right of drainage may have been established by this user, but have you not lost the right of poisoning the water?] That is incidental to the efficient use of the adit. It is useless to drain mines that cannot be worked. *Mason v. Hill (a)* shews that the first occupant of the water of a natural stream, who appropriates it to his own use, cannot afterwards be deprived of it by the owner of the land above; and this, however short his enjoyment may have been. If therefore an artificial adit is on the same footing as a natural stream, it follows that the plaintiffs might have established a right to use the water in a pure state long before twenty years had expired, even by appropriation for a single day, unless the mine owner had previously enjoyed the right to defile it for twenty years; yet it is not pretended that the plaintiffs gained any right till the lapse of twenty years. The miners may be said to be, as it were, manufacturers of water, as much as if they had produced it from steam by condensation, or any other artificial means. In *Brown v. Best (b)* the stream issued from a natural spring; and the same observation applies to the other cases cited for the plaintiffs. An adit is only a cheaper machine than a steam engine working without remission; yet it can scarcely be said

(a) 3 B. & Ad. 304.; 5 B. & Ad. 1.

(b) 1 Wils. 174.

that

that the latter could give a right. Suppose adventurers in a mine pay a rent for the use of a neighbouring water-course, and divert it to serve their purpose for twenty years and upwards; can another person, who has used the waste water during that time, compel the miners to continue the diversion for his benefit when it is no longer wanted for the mine? Can one, who has been obliged to drain his land for twenty years, be compelled to continue draining it for ever? Where a canal company make a reservoir to feed their canal in dry seasons, and suffer the surplus water to run off, if the water is appropriated by some landowner as it runs to waste for twenty years, can he thereby oblige the company to keep their reservoir so as to continue to overflow for his sole advantage? [*Patteson J.* I see no reason why he should not.] The purpose of the original formation of the adit was never abandoned. It was always liable to resumption, and must have been known to be so. It is suggested that a distinct notice to the plaintiffs might have kept alive the right of resumption: if this be true, what other information would such notice have conveyed, than that which the plaintiffs already have from the very nature of the work itself? Its visible use and object is notice enough. [*Coleridge J.* If the nature of an adit is sufficient notice, user of the water for a hundred years would not gain the right, according to your argument. *Patteson J.* No evidence was offered of any notice of an intention to resume the use of the adit; nor was I required to ask the jury whether the plaintiffs must necessarily have known of such intention. To allege a general practice of resuming, is only another way of insisting upon the custom, which was expressly negatived by the jury. The right must depend on con-

1840.

MAGOR
against
CHADWICK.

1840.

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MAGOR
against
CHADWICK.

tract, or custom, or the general principles of law.] It is said that the defendants might have fouled the water from time to time; but this would not have been enough since 2 & 3 W. 4. c. 71., unless they continued fouling it for a whole year. It may not indeed be physically impossible to do so, but to require it would be imposing a very unreasonable burden. As to the doctrine of reciprocity, there is no such general principle known to the law, as that a party who subjects the land of another to a burden is thereby presumed to submit to one himself. A right of way implies no obligation to use it. A right of common will not entitle the landowner to insist on the turning out of cattle, whether the commoner wishes it or not. Such a mutual compact may exist; but mutuality is not a necessary consequence of law. [*Patteson J.* The mutual obligation certainly does not follow of course; but it is contended that, where a servitude may be beneficial to the owner of the servient land, after twenty years a right *may* be gained on both sides.] Though a presumed grant is dispensed with by the statute, the right must be one capable of originating in a grant: mere user of that which is no longer under my controul will establish no easement against me. A grant of the use of the water would be nugatory; for the person through whose land it flows may use it without leave or licence. The plaintiff's claim amounts to an easement affecting all lands above the adit's mouth capable of being benefited by its drainage. Nor is the easement confined to the right to have pure water; for, according to the argument of the plaintiffs, if any inconvenience should arise to them from increasing or diminishing its quantity, they are entitled to require that neither more nor less water shall flow than before. Such a claim is unreasonable:

reasonable: it may render a large tract of country unprofitable to its various owners. [*Patteson* J. If the owner of the land through which the adit was made had expressly laid himself under an obligation not to defile the water, the same consequence might have followed: other proprietors could not use the adit without his consent, and he cannot authorize them to do more than he could himself.] There is no authority in support of an easement obtained by user under circumstances like the present. The cases of light and air, which are most like it, are anomalous; and light is the subject of a distinct provision in sect. 3 of stat. 2 & 3 W. 4. c. 71. They differ from the case of adit water in this material respect, that a party who opens a window owes the light and air to no act done by his neighbour, and cannot be presumed to know that his neighbour will hereafter obstruct them. Rights of common and of way may indeed debar the owner from using his land to the best advantage, but the exercise of such claims without right is actionable; and it is by the owner's laches that the right is finally established. Here the defendants do not deny that the plaintiffs had a right to use the water; but they maintain that the user is subject to the original right of those to whom the adit belongs.

Then as to stat. 2 & 3 W. 4. c. 71., *Arkwright* v. *Gell* (a) decides that it will not confirm a claim like this, where there is no ground for presuming a grant. That case is exactly in point; and, though some dicta in it may be referable to the character of jurors rather than of judges, it is not essentially distinguishable from the present. The user was in neither case of

1840.

MAGOR
against
CHADWICK.

(a) 5 M. & W. 203.

1840.
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 MACOR
 against
 CHADWICK.

right as against the owners of the adit or sough, because it did not affect their interest, and was incapable of effectual interruption until they resumed the working of the mines. Under a traverse of the user, the defendants may shew the "character and description" of it, or "any other circumstances which negative that it is an user or enjoyment under a claim of right;" *Beasley v. Clarke (a)*. By sect. 2 of the statute, the claim may be defeated in any way by which it was liable to be defeated before the statute, except by proof of a prior origin. The circumstances here tend to shew the improbability of an absolute right, and might have been left to the jury. [*Patteson J.* I was not asked at the trial to put any question to them about the probability of a limited grant or reserved right. It was not even shewn under what right the defendants claimed to use the adit at all. The defendants relied only on a custom, and on the peculiar nature of adit water.] Notwithstanding the omission of counsel, the Court will grant a new trial in a case of great importance, like this, if it has not been properly submitted to the jury.

Cur. adv. vult.

Lord DENMAN C. J. in this term (*January 24th*) delivered the judgment of the Court. After shortly stating the proceedings at nisi prius, as above, his Lordship proceeded.

The custom was evidently set up at the trial as the medium of proof that the enjoyment had not been of right; and, that custom being negatived by the jury, the defendants' case failed in fact.

(a) See the judgment, 2 *New Ca.* 709.

On the argument for a new trial, the defendants took other ground. They said that the artificial nature of the adit, and the known practice of all the mineral districts, were strong evidence, even in the absence of a custom, to shew that the plaintiffs' enjoyment was not of right; because they must have known that the owner of the mine had made the water-course for his own convenience, and had ceased to work it with the intention of resuming that work whenever it suited his interest, and with all the rights of throwing in dirt and rubbish which usually attend these operations. And great stress was laid on the recent decision in the Exchequer of *Arkwright v. Gell (a)*, where the Court, placed by consent in the situation of a jury, declined to draw the inference of an exercise by right, because they thought the circumstances would not have warranted the presumption of a grant. So, it was said, the universal mode of proceeding in the mining district would have been material to shew that the plaintiffs used the water with no idea of having a right to it, but were merely taking advantage of the accidental non-user of the adit for such time as it happened to be useful to them.

We are by no means prepared to say that the circumstances under which a water-course has been enjoyed may not prove it to have been without right; or that a universal practice in the neighbourhood might not lead to fix the party with knowledge that those who cleared a mine by an adit notoriously reserved to themselves the right of working the mine at any time. But this view was never pressed on the learned Judge on the trial, the defendants relying on proof of their custom,

1840.

 MAGOR
 against
 CHADWICK.

(a) 5 M. & W. 203.

1840.
—
MAGOR
against
CHADWICK.

and electing to stand or fall by the opinion which the jury might form upon it. The point was properly raised; and the complaint is not even that the verdict was wrong on the evidence put forward, but merely that the defendants themselves did not rest their case on such strong facts as they might.

The imputed misdirection is, that the law of water-courses is the same, whether natural or artificial. We think this was no misdirection, but clearly right. The contrary proposition, that a water-course, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to us quite indefensible. And the late case in the Exchequer leads to no such conclusion.

In the exercise of our discretion we were urged to grant a second trial, on account of the great importance of the question in the mining county of *Cornwall*, and because there may have been some misconception at the trial. And we might think this reasonable, on payment of costs, if the present verdict could have the effect of binding important rights. But we do not think it can, the custom not being expressly pleaded, and the defendants not being the makers of the adit, but mere strangers and wrongdoers. As against them the exercise might furnish, unanswered, conclusive evidence of a right, though those who formed the channel might have a superior right to the plaintiffs.

S.

Rule discharged.

1840.

The QUEEN *against* GWILT.Friday,
January 31st.

A RULE nisi was obtained this term (*January 22d*) for a criminal information against *Francis Dominic Gwilt* for an assault. The material facts stated on affidavit were as follows. On *January 12th*, the defendant, in a conversation with the prosecutor, said that, the first time he met prosecutor in the streets, he would assault him; to which prosecutor answered that, the moment he did so, he would give him in charge to a policeman. On *January 14th*, defendant met prosecutor in the street and struck him. Prosecutor called for a policeman; and one came up, but, not having seen the assault, declined interfering without a warrant; and prosecutor was going with the policeman to procure one, but defendant then admitted the assault. The policeman thereupon took him into custody, and conveyed him to the police station, where prosecutor charged him with the assault before the inspector, and he was locked up in a cell till (after being detained two hours) he procured bail to appear the next day before the magistrates at the Police Court. He did so appear; and prosecutor then gave notice that he should not proceed upon the charge there, but take his remedy before another tribunal; whereupon defendant was dismissed.

Defendant threatened prosecutor to assault him the first time they met in the street, to which prosecutor answered that he would give defendant into custody if he did so. On their meeting afterwards in the street, defendant assaulted prosecutor, who thereupon called a policeman and gave defendant into custody, but without warrant, the policeman thinking it unnecessary, though he had not witnessed the assault, as defendant confessed it. Defendant was locked up at the station-house till he gave bail to appear before a police magistrate. He appeared accordingly; but prosecutor declined to press the charge there, saying that he should

R. V. Richards and *Humfrey* now shewed cause. The prosecutor is not entitled to a criminal information, hav-

take another remedy; and he afterwards moved for a criminal information.

Held, that the prosecutor could not be considered as having elected his remedy in the first instance, so as to preclude himself from moving for an information.

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1840.

—
The QUEEN
against
GWILT.

ing already adopted a different course of proceeding, and that on previous consideration. *Ex parte* —, *Gent. (a)* was a similar case, but more favourable to the prosecutor. It makes no difference that the prosecutor here did not take out a warrant: he would have done so if the policeman had not consented to act without it; and the defendant was in fact imprisoned two hours on the charge.

Sir *W. W. Follett* and *Bayley*, *contra*. The prosecutor was justified by the defendant's previous threats in causing him to be arrested at the time of the assault; but he did not follow up that proceeding. *Ex parte* —, *Gent. (a)* is distinguished from this case by the circumstance that a warrant had there been taken out, on which the defendant was held to bail, and the proceedings so commenced had not been abandoned when cause was shewn against the rule for a criminal information. (They also argued the present case on the merits in other respects.)

Lord DENMAN C. J. There is no doubt that if, in such a case as this, the complainant has already adopted a regular course of what we may consider legal proceedings, he cannot come to this Court for a criminal information. But here, the defendant having before told the prosecutor that he would assault him wherever he met him, the immediate step which the prosecutor took must be considered merely as a security against repetition of the assault. And, as no excuse appears on the other facts, the rule must be absolute.

(a) 4 *A. & E.* 576. note (a).

LITLEDAL, WILLIAMS, and COLERIDGE Js. concurred.

1840.

Rule absolute (a).

The QUEEN
against
GWILT.

(a) See *Rex v. Fielding*, 2 Burr. 719.; *Rex v. Mahon*, 4 A. & E. 575.

TRUEMAN and Others *against* LODER.

ASSUMPSIT. The declaration stated that plaintiffs, at the request of defendant, bargained and agreed with him to buy of him certain tallow, to be delivered by defendant on or between 1st October and 31st December 1835, on terms set forth in the declaration; that, in consideration that plaintiffs, at defendant's request, had promised to receive the tallow, and pay for it, defendant promised to deliver it; that the time for delivery had elapsed, and plaintiffs had always been ready and willing to receive according to the terms of the contract, and pay &c., of which defendant had notice; yet defendant had not delivered. There was a second count for breach of a similar contract, relating to another parcel of tallow; and a count on an account stated.

Plea, Non Assumpsit.

Defendant, a merchant residing at St. Petersburg, carried on business in London through H., who had himself no capital or credit, and was universally known to represent defendant, though H.'s name was always used. Defendant gave notice to H. that he purposed to cease employing him: after which H. contracted with plaintiff to sell him tallow (of more than 10l. value); and H.'s name was

used as before. H. intended to make the contract on his own account: but plaintiff did not know this, and believed that H. represented defendant as usual. The contract was made by a broker, W., acting for both parties. He signed bought and sold notes; the former beginning "Bought for T." (the plaintiff); and the latter "sold for H. to my principals:" no buyer or seller being further named.

1. Held, that defendant was liable for the non-delivery of the tallow, plaintiff having no notice that the name H. ceased to mean defendant; that the bought and sold notes constituted a sufficient note in writing to charge defendant within stat. 29 C. 2. c. 3. s. 17.; and that no objection lay to the admission of parol evidence of the above facts, as varying the written instrument.

2. Evidence was offered, by defendant, of a custom in the tallow trade that, on such contracts as the above, "a party might reject the undisclosed principal, and look to the broker for the completion of the contract." Held inadmissible, as varying a written instrument.

3. And semble, that, if such evidence were admissible, the custom would not apply here; the principals being, in fact, disclosed to the broker, who acted for both parties.

On

1840.

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TRUMAN
against
LODGE.

On the trial, before Lord *Denman* C. J., at the *London* sittings after *Michaelmas* term 1837, it appeared that the contract on which the action was brought was made through a broker named *Woolner*, who appeared to have acted for both parties. The nominal seller was a person named *Higginbotham*. As to the contract first mentioned in the declaration, the bought note was as follows. "*London, 28th April 1835. Bought for Messrs. Truman and Cook. One thousand casks &c., 'to be delivered on' &c. 'Benjamin Woolner, broker.'*" The sold note, as to the same contract, was as follows. "*London, 28th April 1835. Sold for Mr. Edward Higginbotham to my principals. One thousand casks &c., 'to be delivered on' &c. 'Benjamin Woolner, broker.'*" No buyer or seller was otherwise mentioned in either note. The bought and sold notes as to the other contract were dated 5th *May* 1835, and resembled the above, so far as the points in dispute are concerned. The contract price in each case exceeded 10*l.* A verdict was found for the plaintiffs, with leave to move for a verdict for defendant, a nonsuit, or a new trial.

Sir *F. Pollock*, in *Hilary* term, 1838, moved accordingly (*a*). The Court took time to consider; and in the same term (*b*) refused the rule as to one point made; but, as to others, granted a rule to enter a verdict for the defendant, or for a nonsuit or new trial. In *Michaelmas* term 1839 (*c*),

(*a*) *January 15th, 1838.* Before Lord *Denman* C. J., *Littledale, Williams, and Coleridge* Js.

(*b*) *January 23d, 1838.* The Court further explained the grounds on which the rule was granted, upon a subsequent enquiry being made by counsel, *January 31st, 1838.* See p. 592., *post.*

(*c*) *November 18th and 20th, 1839.* Before Lord *Denman* C. J., *Patteson, Williams, and Coleridge* Js.

Sir

Sir *J. Campbell*, Attorney General, Sir *W. W. Follett*, and *J. Greenwood*, shewed cause; and Sir *F. Pollock*, *Cresswell*, and *R. V. Richards* were heard in support of the rule. The facts of the case and the course of the arguments will fully appear from the judgment.

1840.

TRUEMAN
against
LODER.

Cur. adv. vult.

LORD DENMAN C. J., in this term (*January 24th*), delivered the judgment of the Court.

There are two points on which the defendant seeks to relieve himself from the verdict which has passed against him in this action of assumpsit, for refusing to deliver tallow sold by him, in *May 1835*, to plaintiffs, the only plea being non assumpsit. He contended that there was no proper evidence of a contract within the Statute of Frauds; and he complained of the rejection of parol evidence of a custom in the tallow trade of *London*.

The plaintiffs and defendant were merchants, the former in *London*, the latter at *St. Petersburg*; and, in 1832, he established one *Edward Higginbotham* to conduct his business in *London* in the name of him, *Higginbotham*, whose name was painted outside the counting-house, and employed in all the contracts. *Higginbotham* had no business of his own, nor capital, nor credit; all was done with defendant's money, for his benefit, and under his instructions. *Higginbotham* was regarded in *London* as the representative of *Loder*, the defendant; who, from the intercourse between *London* and *St. Petersburg*, and from his continual correspondence with *Higginbotham*, must have been aware of all these facts. They were not, indeed, disputed at the trial.

It

1840.
—
TRUMAN
against
LODER.

It appeared, however, that, shortly before the transaction in question, the defendant had become dissatisfied with *Higginbotham's* proceedings, had remonstrated against some of them, and had given him notice that his services would not be required much longer. The defence upon the merits was, that this change had induced *Higginbotham* to contemplate setting up in the same trade for himself, and that he had made this sale to the plaintiff exclusively on his own account. He died before action brought; and, the evidence being contradictory as to his intentions, the opinion of the jury was taken, who found that *Higginbotham* intended to make the sale on his own account, but found also that the plaintiffs' broker thought that he made it for the defendant, in consequence of the long course of dealing in which *Higginbotham* had been the known representative of the defendant.

This was claimed on the defendant's part as a verdict in his favour. I thought it a verdict for the plaintiffs, and directed it to be so entered.

A motion for a new trial on this point was refused by the Court, on the ground that *Higginbotham* was trading in his own name as the defendant's agent, with the defendant's full knowledge and authority; and that, till the defendant gave notice to the world that he revoked *Higginbotham's* power to act for him, all persons had a right to hold him to the contracts made by *Higginbotham*. In a word, it was considered that the defendant was carrying on his business in the name of *Higginbotham*.

The turn which the argument took makes it necessary for us to declare that we deliberately abide by the
opinion

opinion then formed. Some cases (a) were quoted with the intention of shaking it, in which the question whether an agent or a partner bound himself only, or his principal or firm, has been held to depend on his intention to deal for himself or for the principal or partnership. But, on examining all those cases, it will be found that the contracting party was carrying on two different concerns, one for himself, the other for his principal or his firm. The world would know him in two different characters; and each party dealing with him was bound to inquire in which he appeared on any particular occasion. But here is the case of one exclusively an agent for another, and in that light only regarded by the customer. Having full authority so to represent himself, he forms the design in his own mind to divert one of his numerous contracts from its expected destination to some purpose of his own. But that design cannot operate to oust the opposite party of those rights against the principal, which both the principal and agent had by their conduct concurred in persuading him that he possessed. Suppose a landed proprietor to send his steward habitually to the neighbouring fairs and markets to make sales

1840.

—
 TREWMAN
 against
 LODGE.

(a) *Ex parte Bolitho*, *Buck's Ca.* B. 100.; *The Governor and Company of the Bank of Scotland v. Watson*, 1 Dow. 40.

Reference was also made to *Furze v. Sharwood*, in Q. B., not reported. This was a cause tried before Lord Denman C. J. at the sittings in London after Michaelmas term, 1837. A verdict was obtained for the defendants, and, in Hilary term 1837, Sir W. W. Follett obtained a rule nisi for a new trial. On June 8th and 9th, 1838 (before Lord Denman C. J., Littledale, Patteson, and Williams Js.), Sir F. Pollock, Cresswell, Wightman, and Cleasby shewed cause, and Sir W. W. Follett and Petersdorff supported the rule. The Court, without deciding the points of law which had been raised, made the rule absolute for a new trial, June 13th, 1838. The cause was tried again, and a special verdict found, which is now in the paper for argument.

and

1840.

TRAUMAN
against
LODER.

and purchases for him in matters connected with the management of his estate; that the steward makes all these contracts in his own name, but that he is universally known to have no land of his own, and to be acting solely for his employer, by his direction and on his credit: could his intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing deprive the vendor of his recourse against the master? Clearly not.

If, then, the defendant chose to appoint an agent to carry on trade for him in the name of *Higginbotham*, he clearly authorised that person to do all that could be necessary for him so to carry it on; among other things, to employ a broker to sell for him; and it does not lie in his mouth to deny that the name of *Higginbotham* so inserted by the broker in the sold note is the defendant's own name of business. Then, as the bought and sold notes, where they are not inconsistent, form the contract, here is a good compliance with the Statute of Frauds in the two instruments signed by the broker, one containing the name of the plaintiffs, the other the trade name by which the defendant thought proper to instruct his agent to deal for him.

Among the ingenious arguments pressed by the defendant's counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, shewing it not to have been made by *Higginbotham*, whose name is inserted in it, but by the defendant, who gave him the authority. Parol evidence is always necessary to shew that the party sued is the person making the contract and bound by it. Whether he does so in his own name or in that
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of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own. The cases of *Wilson v. Hart* (a), and *Whitehead v. Tuckett* (b), and *South Carolina Bank v. Case* (c), though not in point, contain matter that illustrates this doctrine.

Other cases occur of single partners signing particular instruments, which have not been held to bind the partnership, though in fact used for and applied to its benefit; *Siffkin v. Walker* (d), *Emly v. Lye* (e). But in these cases the partnership was at the same time carrying on business in the name of its firm, and did not appear to have done any act which could have led the contracting party to believe that it authorised the individual partner to employ his own name for their common purpose; a distinction which makes these decisions inapplicable to the present case (g).

The

(a) 7 Taunt. 295.

(b) 15 East, 400.

(c) 8 B. & C. 427.

(d) 2 Camp. 307.

(e) 15 East, 7.

(g) In arguing the question as to the effect of the bought and sold notes, and the admissibility and effect of the parol evidence relating to the contract, the point on which the Court refused the rule, namely, whether the finding of the jury entitled the plaintiff, or the defendant, to the verdict, was also incidentally discussed. On these points, the following authorities, besides those mentioned in the judgment, were referred to. *Thomson v. Davenport*, 9 B. & C. 78.; *Domett v. Beckford*, 5 B. & Ad. 521.; *Champion v. Plummer*, 1 N. R. 252.; *Hawes v. Forster*, 1 Moo. & R. 368.; *Thornton v. Meuz*, Moo. & M. 43.; *Magee v. Atkinson*, 2 M. & W. 440.; *Jones v. Littledale*, 6 A. & E. 486.; *Paterson v. Gandasequi*, 15 East, 62.; *Campbell v. Hodgson*, Gow, 74.; *Mason v.*

1840.

TRUMAN
against
LODER.

The second point arose in the following manner. Mr. *Woolner*, the broker who effected the contract, was called to prove it. He was not examined on the voir dire; but, on cross-examination, the question was proposed, "Whether it was not a custom in the tallow trade that under such contracts a party may reject the undisclosed principal, and look to the broker for the completion of the contract." I was of opinion, after argument, that this question could not be proposed. He admitted, however, that he had been released by the plaintiff in order to his being called as a witness; adding that, though not legally, yet morally, some responsibility might attach to him. At the close of plaintiff's case, the same evidence was tendered in a more solemn manner, as furnishing a defence to the action. I still thought it inadmissible; and the present question is, whether I was right in rejecting it at both those periods of the trial.

No distinction can be made between the two periods. The defendant had, indeed, all the benefit of assailing the witness's credit from his acknowledgment that there was a sufficient responsibility to make a release desirable; but he had a right to shew that it was legal, as well as moral, so as to create in him a direct interest in the verdict, if the evidence from which he inferred it was admissible.

The manner in which the defendant would have applied this evidence was not quite clear. At one time, he treated himself as the undisclosed principal, and the plaintiffs were supposed to have the right of rejecting

Rumsey, 1 Campb. 385.; *White v. Proctor*, 4 Taunt. 209.; *Seton v. Slade*, 7 Ves. 265.

him,

him, and adopting the broker in his stead. Their release given to Mr. *Woolner* might have been taken as some indication of their having so acted. At another time, it seemed as if *Higginbotham* was to be considered as the broker; and that the plaintiffs, through *Woolner*, had exercised their option of placing him in the position of seller, thereby releasing his principal, the defendant. And there was some doubt whether the contract was of such a nature that the custom, as to undisclosed principals, could attach upon it; for, consisting, as it is admitted to consist, of bought and sold notes, it does disclose a principal, not indeed to the plaintiffs themselves, who personally took no part in it, but to *Woolner*, the broker, whose knowledge must be taken as theirs. In this view of the case, such a custom could never operate, unless the bargain were transacted by two different brokers, each ignorant of the name of the principal with whom he was dealing.

But it is fit to decide on general grounds on the admissibility of this kind of evidence, engrafting on a written contract terms and stipulations to be implied from a practice and custom so universally prevailing that it must in fact be known to all concerned in the trade.

If a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts; while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to

1840.

TRUMAN
against
LODER.

1840.

TRUMAN
against
LODER.

vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom in trade as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them: a conflict may exist between the customs of two different places; and, supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom.

Considerations of this kind gave birth to the Statute of Frauds, requiring that in certain cases no unwritten contract shall be received. But, with regard to such as the parties themselves have agreed to reduce to writing, common sense has established the plain rule, that the writing must bind, and that no spoken words can be allowed to relax or vary its obligation. Evidence of the prevailing custom is supposed to shew that both parties had something in their contemplation more than appears in the writing; but suppose them both to have, not only contemplated, but distinctly expressed, in the plainest words, that they considered their contract to include a provision not to be found in the paper, still the evidence cannot be introduced into the cause.

Custom of trade has been supposed to form a virtual exception to this well known rule; but the cases go no farther

farther than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract.

Hodgson v. Davies (a) is one of the strongest; but, if it establishes any thing, it certainly cannot be said to go this length. A vendor was there sued for not fulfilling his bargain: his defence was that, payment being to be made by bills, he had a right to reject the contract, if dissatisfied with the credit of the purchaser; and he offered to give proof of such usage of trade. Lord *Ellenborough's* first impression was that the contract must be absolute, unless his authority was limited by writing of which the purchaser had notice. The jury informed his Lordship that, unless the name is first communicated to the seller, he is understood to reserve the power of disapproving the sufficiency of the purchaser, and annulling the contract. He then admitted that evidence; but he immediately added that the power must be acted on in a reasonable time; and the jury agreed with him in thinking five days a time unreasonably long. It seems by the report that the defendant had, in the first place, offered evidence that by the custom *bill* meant *approved bill*, and that the vendor had the option of rejecting any bill which he disapproved. But Lord *Ellenborough* rejected the evidence, saying that the contract must speak for itself: therefore, the opinion of that learned Judge was against receiving any evidence; and, though the representation of the special jury led him to admit it for one purpose, the finding of the jury in the plaintiff's favour prevented all question in this Court of what was done at *Nisi Prius*.

1840.

TRUEMAN
against
LODER.

(a) 2 Camp. 530.

1840.

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 TRUEMAN
 against
 LODER.

Dickinson v. Lilwall (a) only shews that a custom may exist for the broker's authority to expire on the same day on which it was given; that is, that he could not bind by the contract made afterwards: quite a different thing from varying the contract when made.

The decisions, that policies shall be construed according to the usual and understood practice of making voyages in particular branches of trade, have no application, as none of them do more than present the necessary explanation of ambiguous terms. Much less the class of cases already observed upon, which have enabled parties to shew with whom they were contracting, though not under their real names.

There was, indeed, a plausible argument, that such was the effect of this tendered evidence; the person called *A.* being indeed *primâ facie*, or at the moment of contracting, *A.*, but with a power in the vendor to convert him into *B.* on the occurrence of certain events. But, whatever disguise may be thrown over the custom thus introduced into the agreement, it would, in fact, be a most special proviso, varying it in essential points. If it could be so modified, it ought to be set out in the declaration according to its supposed, but always questionable, import: and, if the jury believed it to qualify the written instrument, it should seem that a party might be nonsuited for a variance in truly setting forth the written contract; which strange consequence might, indeed, follow in every instance of holding that parol stipulations can be made part and parcel of a contract in writing (b).

The

(a) 4 *Camp.* 279.

(b) On the question as to the admissibility of evidence of the custom, the following cases, besides those mentioned in the judgment, were referred

The result is, that the defendant was sufficiently proved to be the vendor, and that the evidence of custom for the purpose of shifting his liability was inadmissible.

This rule must, therefore, be discharged.

Rule discharged.

1840.

TRUEMAN
against
LONER.

ferred to in argument; *Blackett v. Royal Exchange Assurance Company*, 2 C. & J. 244., S. C. 2 Tyrwh. 266.; *Parkinson v. Collier*, 2 Park on Ins. 470.; *Rawson v. Walker*, 1 Stark. N. P. C. 361.; *Foster v. Jolly*, 1 C. M. & R. 703., S. C. 5 Tyrwh. 239.; *Moseley v. Hanford*, 10 B. & C. 729.; *Mores v. Ansell*, 3 Wils. 275.; *Adams v. Wordley*, 1 M. & W. 374., S. C. Tyrwh. & Gr. 620.; *Magee v. Atkinson*, 2 M. & W. 440.; *Jones v. Littledale*, 6 A. & E. 486.; *Paterson v. Gandasequi*, 15 East, 62.; 2 Phill. Ev. 767., &c. (8th ed.).

See *Johnston v. Osborne*, *antè*, p. 549.

1840.

REGULA GENERALIS.

HILARY TERM, 3d VICTORIA, 1840.

IT IS ORDERED, That the following forms of writs, framed by the Judges pursuant to the statute 1 & 2 *Vict. c. 110. s. 20.*, be used from and after the first day of next *Easter* term in the cases to which they are applicable, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; and that in all cases in which the judgment is for a penalty, and the plaintiff seeks to obtain interest, there shall be a memorandum on the back, or at the foot, of the writ, directing the sheriff to levy the amount of the sum of money really due and secured by the penalty, and of the damages and costs recovered and interest thereon, at the rate of *£4 per centum* per annum from the time when the judgment was entered up, or, if it was entered up before the first of *October* 1838, then from that day; and that, in the cases in which the amount for which the judgment has been given is less than the amount of the sum of money really due and secured by the penalty and the damages and costs recovered, and the interest thereon calculated as aforesaid, it shall be stated, in the body of the writ, that the sheriff is to levy interest at the rate of *£4 per centum* per annum from the — day of —, and on the back, or at the foot of the writ, there shall

shall be a memorandum as above directed; and that, in the case of an assessment of further damages under a writ of *scire facias* pursuant to the statute of 8 & 9 *W. 3.*, it shall be stated, in the body of the writ of execution, that the sheriff is to levy interest on the damages assessed and costs taxed in that behalf at the rate of *£4 per centum per annum* from the day on which execution was awarded, unless execution was awarded before the first of *October 1838*, and in that case from that day:—BUT IT IS FURTHER ORDERED, that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

1840.

No. I.

VICTORIA, by the Grace of God, of the United Kingdom of *Great Britain and Ireland* Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you take *C. D.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster*, immediately after the execution hereof, to satisfy *A. B. £—*, which the said *A. B.* lately in our court before us at *Westminster* recovered against the said *C. D.* for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said *C. D.* to the said *A. B.*, as for his costs and charges by him about his suit in that behalf expended; whereof the said *C. D.* is convicted, as appears to us of record, together with interest upon the said sum of *£—*, at the rate of *£4 per centum per annum*, from the — day of —, in the year of our Lord — (a), on which day the judgment aforesaid was entered up, and have there then this writ.

Writ of *capias ad satisfaciendum*, on a judgment in the court of *Q. B.*, in an action of *assumpsit*.

Witness, *Thomas Lord Denman*, at *Westminster*, on the — day of —, in the year of our Lord —.

NOTE.— This and all other writs of execution may be made returnable on a day certain in term.

(a) The day on which the judgment was entered up, or, if entered up prior to the 1st of *October 1838*, say "from the 1st day of *October*, in the year of our Lord 1838," omitting the words "on which day the judgment aforesaid was entered up."

No. II.

1840.

No. II.

Writ of *capias ad satisfaciendum*, on an order of the court of Q. B., for payment of money.

VICTORIA, by the Grace of God, of the United Kingdom of *Great Britain and Ireland* Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you take *C. D.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster*, immediately after the execution hereof, to satisfy *A. B.* £—, which lately in our court before us at *Westminster*, by a rule of our said court, entitled &c. [*as the case may be*], were by the said court ordered to be paid by the said *C. D.* to the said *A. B.*, and further to satisfy the said *A. B.* interest upon the said sum of £—, at the rate of *£4 per centum per annum* from the — day of —, in the year of our Lord — (a), on which day the said rule was made, and have there then this writ.

Witness *Thomas Lord Denman*, at *Westminster*, on the — day of —, in the year of our Lord —.

No. III.

Writ of *capias ad satisfaciendum*, on an order of the court of Q. B., for payment of money and costs.

VICTORIA, by the Grace of God, of the United Kingdom of *Great Britain and Ireland* Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you take *C. D.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster*, immediately after the execution hereof, to satisfy *A. B.* £—, which lately in our court before us at *Westminster*, by a rule of our said court, entitled &c. [*as the case may be*], were by the said court ordered to be paid by the said *C. D.* to the said *A. B.*, together with the costs of the said rule, which said costs were afterwards on the — day of —, in the year of our Lord —, taxed and allowed by our said court at the sum of £—, and further to satisfy the said *C. D.* the said sum of £— (b), together with interest upon the said two several sums of £— and £—, at the rate of *£4 per centum per annum*, from the said — day of —, in the year of our Lord — (c), and have there then this writ.—

Witness *Thomas Lord Denman*, at *Westminster*, on the — day of —, in the year of our Lord —.

(a) The day on which the rule was made, or, if it were made prior to the 1st of *October* 1838, say, “from the 1st day of *October*, in the year of our Lord 1838,” omitting the words “on which day the said rule was made.”

(b) The amount of the costs taxed.

(c) The day on which the costs of the rule were taxed, or, if that were prior to the 1st of *October*, 1838, say “from the first day of *October*, in the year of our Lord, 1838.”

No. IV.

1840.

VICTORIA, by the Grace of God, of the United Kingdom of *Great Britain and Ireland* Queen, Defender of the Faith, to the sheriff of —, greeting. We command you, that you take *C. D.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster* immediately after the execution hereof, to satisfy *A. B.* £—, which the said *A. B.* lately in [*insert the style of the court*], by the judgment of the said court, recovered against the said *C. D.* for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said *C. D.* to the said *A. B.*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted as appears to us of record, and which judgment was afterwards on the — day of —, in the year of our Lord —, removed into our court before us at *Westminster*, by virtue of an order of our said court before us at *Westminster* [*or of —, one of the justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said order and upon the said removal were on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at *Westminster*, at the sum of £—, and further to satisfy the said *A. B.* the said sum of £— (*a*), together with interest upon the said two several sums of £— and £—, at the rate of £ 4 *per centum* per annum, from the said — day of —, in the year of our Lord (*b*), and have there then this writ.

Writ of *capias ad satisfaciendum*, on a judgment in an inferior court in an action of *assumpsit*, removed into the Court of Q. B.

Witness, *Thomas Lord Denman*, at *Westminster*, on the — day of —, in the year of our Lord —.

No. V.

VICTORIA, by the Grace of God, of the United Kingdom of *Great Britain and Ireland* Queen, Defender of the Faith, to the sheriff of — greeting. We command you, that you take *C. D.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster* immediately after the execution hereof, to satisfy *A. B.* £—, which lately in [*insert the style of the court*], by a rule of the said court, entitled &c. [*as the case may be*], were by the said court ordered to be paid by the said *C. D.* to the said *A. B.*, and which rule was afterwards on the — day of —, in the year of our Lord —, removed into our court before us at *Westminster*, by an order of our said court before us at *Westminster* [*or of —, one of the justices of our said court before us at Westminster, as the case may be*], in pursuance of the

Writ of *capias ad satisfaciendum*, on an order of an inferior court for payment of money, removed into the Court of Q. B.

(*a*) The costs attendant upon the removal of the judgment out of the inferior court into the court of Q. B.

(*b*) The day on which the costs of removal were taxed.

statute

1840.

statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at *Westminster*, at the sum of £—, and also to satisfy the said *A. B.* the said sum of £— (a), together with interest on the said two several sums of £— and £—, at the rate of £4 *per centum per annum*, from the said — day of —, in the year of our Lord — (b), and have there then this writ.

Witness, *Thomas Lord Denman*, at *Westminster*, on the — day of —, in the year of our Lord —.

No. VI.

Writ of *capias ad satisfaciendum*, on an order of an inferior court, for payment of a sum of money and costs, removed into the Court of Q. B.



VICTORIA, by the Grace of God, of the United Kingdom of *Great Britain and Ireland* Queen, Defender of the Faith, to the sheriff of —, greeting. We command you, that you take *C. D.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster* immediately after the execution hereof, to satisfy *A. B.* £—, which lately in [*insert the style of the court*], by a rule of the said court, entitled &c. [*as the case may be*], were by the said court ordered to be paid by the said *C. D.* to the said *A. B.*, and also £—, for the costs of the said rule, by the said court also ordered to be paid by the said *C. D.* to the said *A. B.*, which said rule was afterwards on the — day of —, in the year of our Lord —, removed into our court before us at *Westminster*, by an order of our said court before us at *Westminster* [*or of —, one of the justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at *Westminster*, at the sum of £—, and also to satisfy the said *A. B.* the said sum of — (a), together with interest on the said three sums of £—, and £—, and £—, at the rate of £4 *per centum per annum*, from the — day of —, in the year of our Lord — (c), and have there then this writ.

Witness, *Thomas Lord Denman*, at *Westminster*, the — day of —, in the year of our Lord —.

DENMAN.	J. B. BOSANQUET.	J. T. COLERIDGE.
N. C. TINDAL.	E. H. ALDERSON.	T. COLTMAN.
ABINGER.	J. PATTESON.	T. ERSKINE.
J. LITLEDALE.	J. GURNEY.	W. H. MAULE.
J. PARKE.	J. WILLIAMS.	R. M. ROLFE.

(a) The costs of removing the rule from the inferior court into the court of Q. B.

(b) The day on which the costs of removal were taxed.

(c) The day on which the costs of removing the rule from the inferior court were taxed.

END OF HILARY TERM.

[1841.]

[The following cases, decided in 1841, are inserted here,
being of immediate practical importance.]

The QUEEN *against* The Inhabitants of ECCLESALL BIERLOW.

[Saturday,
April 17th
1841.]

ON an appeal against an order of justices, removing *William Chappell* from the township of *Dodworth* to the township of *Ecclesall Bierlow*, both in the West Riding of *Yorkshire*; the sessions confirmed the order, subject to the opinion of this court on a case of which the following are the material facts.

The only examinations whereon the order was made were those of the pauper's father and of the pauper himself, and were in the following words :

"West Riding of *Yorkshire* (to wit) : the examination of *William Chappell* of *Cawthorne* in the said riding, mason, touching the place of his son's legal settlement, taken upon oath before us, two " &c. the 26th *February*, 1840 ; who saith as follows. " I am sixty-two years of age, and was born at *Doncaster* in the said riding ; but the place of my father's settlement was at *Ecclesall Bierlow* in the said riding, as I have heard him say and believe to be true ; and I have heard my father say that he has had relief from the overseers of *Ecclesall Bierlow* aforesaid : and I never did any act in my own right to gain a settlement. About thirty-eight years

It is a good ground of appeal (understat. 4 & 5 W. 4. c. 76. s. 81.), against an order of removal, that the examination upon which it was made, though it sets forth facts which shew a settlement, does not disclose any legal evidence of such facts.

Therefore, where an order of removal was made upon the examinations of the pauper and his father, in which the father stated that the place of his father's settlement was *E.*, as he had heard his father say and believed to be true, and that he had heard his father say he had received relief from the overseers of *E.* ;

and the pauper himself stated that his father's place of settlement was at *E.*, as he had heard him say and believed to be true : Held, that such order was bad on an appeal stating, as one of the grounds, that the order was "bad and inoperative," and the examinations on which it was made "defective and insufficient to ground and support the same."

ago

[1841.]

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The QUEEN
against
The Inhabit-
ants of
ECCLESALL
BIERLOW.

ago I was married at *Cawthorne* church to *Martha Robson* my now wife, by whom I have six children; and I have a son named *William*, aged thirty-two years, and who is now ill, and resides in *Dodworth*, but who never was an apprentice, nor did any act in his own right to gain a settlement; and he is now chargeable to *Dodworth* aforesaid." [Signature and jurat.]

"West Riding of *Yorkshire* (to wit): the examination of *William Chappell* the younger of *Dodworth* in the said riding, mason, touching the place of his settlement, taken upon oath before us, two" &c., "the 26th February 1840; who saith as follows. I am thirty-two years of age, and was born at *Cawthorne* in the said riding; but the place of my father's settlement, as I have heard him say and believe to be true, is at *Ecclesall Bierlow* in the said riding. I have heard the above examination read over to me, and I believe the same to be true, and that I never did any act in my own right to gain a settlement. I was married at *Silkstone* church about seven years ago to *Esther Hobson* my now wife, by whom I have three children, namely" &c.; "and I am poor and actually chargeable to *Dodworth* aforesaid." [Signature and jurat.]

A copy of the order of removal and of the above examinations, and notice of chargeability, were duly sent to the appellants; who thereupon gave due notice of appeal with the following grounds of appeal: namely; That the place of the legal settlement of the said *William Chappell* and *E.* his wife and their three children was not in *Ecclesall Bierlow*: That the place of settlement of the grandfather of the said pauper was not in *Ecclesall Bierlow*; nor had the said grandfather relief from the overseers of *E. B.*, as in the said examinations is mentioned,

tioned, or otherwise; nor was the place of settlement of the father of the said pauper at *E. B.* as in the examinations is also mentioned: that the order of removal was bad and inoperative, and the examinations on which it was made defective and insufficient to ground and support the same.

At the sessions, the appellants insisted, before any evidence was heard, that the order of removal should be discharged, the examinations being insufficient; first, because they contained no legal evidence of the pauper's settlement being in the appellant township; and, secondly, because, even if there were such evidence, it was confined to the fact of relief given to the pauper's grandfather by the appellants, and that it ought to have appeared what township or place the grandfather was residing in when so relieved. The sessions over-ruled these objections, heard the appeal, and confirmed the order of removal. If this Court should hold either of the objections good, the orders of removal and order of sessions were to be quashed; otherwise to be confirmed.

Erle and *W. Walker*, in support of the order of sessions. The principal question is, whether it be a ground of appeal against an order of removal that the examinations contained only hearsay evidence of a settlement and of relief in the appellant parish. Stat. 4 & 5 W. 4. c. 76. s. 81. appears to have contemplated no other alteration in the former practice in the case of removals, than to put the parish to which the removal is made in possession of the evidence upon which it was founded, and to confine the removing parish to the grounds of removal set forth in it. Now there can be no doubt that, before that act, it never was a ground of appeal that
the

[1841.]

The QUEEN
against
The Inhabit-
ants of
ECCLESALL
BIRLOW.

[1841.]

The QUEEN
against
The Inhabit-
ants of
ECCLESALL
BIERLOW.

the order was made upon insufficient or inadmissible evidence; nor were the sessions precluded from receiving other and better evidence offered by the respondents on trial of an appeal. Under stat. 13 & 14 *Car. 2. c. 12.*, it was not necessary that the order should pur-
port to be made on examination upon oath; *Munger-Hunger v. Warden (a)*. The complaint need not be stated to be on oath; *Rex v. Southwold (b)*: and the statute does not require it to be so; *Rex v. Standish (c)*. The pauper need not be examined, *Rex v. Bagworth (d)*, *Rex v. Everdon (e)*; and there is nothing in the act to prevent the removal of a pauper by two justices upon their own personal knowledge of his settlement. If the removing justices wilfully make the order without sufficient ground, they may be prosecuted criminally; *Rex v. Wykes (g)*: but the order is not therefore bad on appeal. The justices act in a judicial character in a matter within their jurisdiction; and this Court will not take notice of the medium of proof by which they came to their decision. The party dissatisfied with it may appeal; and upon such appeal the sessions are called upon to decide upon the evidence adduced before them, and not upon that which was taken by the two justices. [*Patteson J.* Suppose the pauper said only, "I am settled in *Ecclesall*;" would that justify the removal?] Perhaps not, for that would disclose no "grounds of removal." But, before the late act, a removal upon such an examination could not have been appealed against solely on that account.

(a) 2 *Sess. Ca.* 40.(b) *Bur. S. C.* 140.(c) *Bur. S. C.* 150.(d) *Cald.* 179, 181.(e) 9 *East*, 101.(g) *Andr.* 238. See also *Rex v. Howarth*, 2 *Bott.* 674. pl. 822. 6th ed.[*Patteson*

[*Patteson J.* The object of the statute must have been to convey information to the parish receiving the pauper. If the examination is as general as the order, what information does it give?] The statute only requires all the information to be sent upon which the justices, in their discretion, made the order. The proceeding is analogous to a writ of summons, or a declaration, in which the plaintiff states the ground of his complaint, but does not set out all his evidence. The statute saves the appellant parish the trouble of discovering the ground of removal, and the hazard of a chance appeal, and it gives them (sect. 80) access to the pauper for the purpose of further examination, so as to enable them to make up their minds to appeal during the twenty-one days. [*Patteson J.* Access is given only to *appellants*.] The parish may have the benefit of access by merely giving notice of appeal. [*Patteson J.* Then they will not have twenty-one days to make up their minds.] If this be a good ground of appeal, few orders can be supported: for some irregular evidence is almost sure to be received in the course of the investigation; and, as the removing parish is obliged to send *all*, *Regina v. Outwell (a)*, and as it cannot appear how far the removal may have proceeded on the inadmissible part, an appeal will generally be successful. It will be incumbent on the removing justices to obtain attesting witnesses to documents; to reject them when unstamped; to require proof by distant witnesses on facts not disputed or doubted; and this, though they have no compulsory process against any

[1841.]

The QUEEN
against
The Inhabit-
ants of
ECCLESALL
BIRKLOW.

(a) 9 A. & E. 836.

[1841.]

The QUEEN
against
The Inhabit-
ants of
ECCLESALL
BIRKLOW.

witness. [Patteson J. They may refuse to make an order, unless legal proof is produced by the overseers.] An order quashed on such grounds will conclude the removing parish. Stat. 3 & 4 W. 4. c. 40. directs the removal of *Irish* and *Scotch* paupers on their own examination, of which the form is given in the schedule, and which must necessarily involve hearsay evidence. [Lord Denman C. J. That shews only that an express enactment was necessary to legitimate such proof.] In *Rex v. Kelvedon* (a) hearsay evidence seems to have been considered sufficient, though it is true that the notice of grounds of objection did not insist on this defect. In *Cave v. Mountain* (b) it was held that a magistrate, who commits on an information, does not act without jurisdiction merely because he proceeds only upon hearsay evidence. In *Rex v. The Justices of Derbyshire* (c) the Court held that the " clauses in this act respecting the grounds of removal and appeal are intended to compel such a disclosure by both parties, as will enable them to go to the sessions fully aware of the questions which are to be discussed : " the statements " must condescend to particulars, *not to the extent of setting out the evidence* by which the facts are to be proved, but so as to give the opposite party reasonable means of enquiry." In *Regina v. Alternum* (d) the incompetency of a witness examined was held no ground of appeal, where it did not appear that the incompetency was shewn to the removing justices. If the contents of an examination be of such a nature that they tend to mislead the appellants as to the ground of settlement (of which tendency the sessions

(a) 5 A. & E. 687.

(b) 1 Man. & Gr. 257. See p. 263.

(c) 6 A. & E. 885.

(d) 10 A. & E. 699.

are

are the proper judges, *Regina v. Bridgewater* (a), it may be a valid objection to the removal; but here the sessions have overruled the objection, and must therefore be taken to have held the examination free from objection on this ground. Of the series of cases, beginning with *Rex v. Brixham* (b), which have decided that a noncompliance with stat. 4 & 5 W. 4. c. 76. s. 79. is a ground of appeal against the order itself, none have gone to the extent of quashing it merely because irregular evidence was originally admitted to support it. In *Regina v. Black Callerton* (c) the objection to the examination resolved itself into a question of jurisdiction: for, if chargeability was *not* proved, then the justices had no power to remove; if it *was* proved, then the evidence of it should have been sent with the other documents. *Regina v. Middleton in Teesdale* (d) will perhaps be relied on, where a defective statement, in the examination, of a settlement by renting appears to have been held to be ground of appeal; but the language of the Court seems to shew that the defect either involved a question of jurisdiction, or was calculated to mislead. The Court did not quash the order, but sent the case back to be reheard at sessions, which would hardly have been done if the order was held to be vitiated by the examination (e).

But, further, before appeal, the proceeding is strictly one between the complaining parish and the pauper; his admission, therefore, is at all events evidence as against him, and warrants an order to remove him.

(a) 10 A. & E. 693.

(b) 8 A. & E. 375.

(c) 10 A. & E. 679.

(d) 10 A. & E. 688.

(e) See Coleridge J. in *Regina v. Bridgewater*, 10 A. & E. 696.

[1841.]

THE QUEEN
against
The Inhabit-
ants of
ECCLESHALL
BIRLOW.

[1841.] *Cresswell and Pashley*, contra, were stopped by the Court.

The QUEEN
against
The Inhabit-
ants of
ECCLESALL
BIRROW.

LORD DENMAN C. J. I have no doubt whatever. The removal of the pauper should be grounded on legal evidence. It is contended that his statement is, at all events, legal evidence against himself; but the answer is, that he is not a party within the rule that makes such admissions evidence; and, if he were, this is not an admission of a fact known to himself, but only a statement of what he had heard another say.

PATTESON J. The parishes are the parties, not the pauper; if he were a party in the sense contended for, a simple admission by him that he was settled in the appellant parish would be a sufficient ground of removal; yet it was conceded, in argument, that an examination disclosing nothing more than that would not have warranted his removal. The argument of hardship and inconvenience seems to me to have no weight; for, sooner or later, legal evidence must be produced; and there appears no good reason why the burden of ascertaining the truth of facts stated upon insufficient evidence should, in the first instance, be thrown upon another parish. It is therefore right that the appellants should be able to object that the removal has been made on no sufficient grounds. If the defect can be cured, the respondents can abandon their order, and make another.

WILLIAMS J. This is, in substance, a removal without any evidence at all.

WIGHTMAN

WIGHTMAN J. concurred.

[1841.]

S. Order of sessions, and of removal,
quashed (a).

The QUEEN
against
The Inhabit-
ants of
ECCLESALL
BIRLOW.

(a) Later on the same day (April 17th) the case of

The QUEEN against TETBURY

was decided by the Court (in the absence of *Wightman J.*) on the same ground as the above. The settlement relied upon was shewn only by hearsay evidence on the face of the examinations; and the notice of appeal specified, as one of the grounds, that the examination did not contain sufficient evidence of the settlement &c. An attempt was made to distinguish the case from *Regina v. Ecclesall Bierlow*; but the Court held it to be governed by that case. In the course of the argument Lord Denman C. J. observed, "We have not said that the admission of some improper evidence will be a ground for quashing an order: I should be slow to hold that."—S.

See, on this last point, as to a trial at Nisi Prius, *Crease v. Barrett*, 1 C. M. & R. 919; S. C. 5 Tyrwh. 458; *De Rutzen v. Farr*, 4 A. & E. 53.; *Wright v. Doe dem. Tatham*, 7 A. & E. 313. In *Rex v. Luffe*, 8 East, 193, in the case of an order of filiation, where it was objected that the order shewed that a wife had been allowed to prove non-access, Lord Ellenborough says, "It does not appear to what particular facts the wife deposed, or what were proved by the other evidence: and then the rule laid down in *The King v. Bedall*" (Ca. K. B. Temp. Hard. 379.) "applies, that if there were other witnesses besides the wife, and she were competent to prove any part of the case, the Court will intend, in support of an order framed like the present, that she was examined only as to those facts which she was competent to prove, and that the rest of the case was proved by the other evidence." Lawrence J. said "Suppose it had been stated in express terms, that the wife had given evidence of the non-access, and that the same fact had been proved by other witnesses, we should presume in the case of an order that the magistrates had proceeded upon the evidence of the other witnesses as to that fact." *Le Blanc J.* appears to take the same view as Lawrence J. And see *Page J.* in *Rex v. Bedell*, Ca. K. B. Temp. Hard. 379. As to appeals at sessions, see the language of Lord Kenyon in *Rex v. Eriswell*, 3 T. R. 724., and of Lee C. J. in *Rex v. Coln St. Aldwin's, Bur.* S. C. 136.

See the next case.

[1841.]

[Monday,
June 14th
1841.]

The QUEEN against The Inhabitants of LYDEARD
ST. LAWRENCE (a).

1. Under sect. 81 of stat. 4 & 5 W. 4. c. 76. (precluding respondents from going into other grounds of removal than those set forth in the order and examination) the sessions must reject evidence of any grounds of removal which do not appear, on the face of the examination, to have been proved before the removing justices by some legal evidence; provided the defect of evidence be pointed out by the notice of objections.

Thus, where a birth settlement of pauper's husband was proved only by the husband stating that he was born in the appellant parish "as I have heard and believe," and the objection was that it was not proved or set forth "upon oath of any credible witness" when or where the husband was born, this Court held that the evidence of the birth was merely hearsay, the objection sufficiently taken, and *all* evidence of the birth inadmissible at sessions.

Although it appeared, in the examination, that the husband, when examined, was "confin'd in W. gaol for felony;" and the respondents contended that the objection pointed only to the inadmissibility of a convicted felon.

2. An examination stated an apprenticeship, and a service in the appellant parish with a party other than the master; but did not state the master's consent. Held, that the examination was bad on the face of it, so far as regarded a settlement by apprenticeship.

Although the examinant (the apprentice) stated that it was agreed, in the indenture, that he should serve the last forty days of his apprenticeship in L., the appellant parish, "and I served the last forty days" in L., "with A. H. my master's father."

Held also, that the objection was sufficiently taken by objecting that it did not appear that the examinant served A. H. with the consent of the master, or in any other manner, under any indenture of apprenticeship, alleging some additional defects, and then proceeding thus, — "and the said examinations are too general, and are wanting in sufficient particularity, in each of these last-mentioned respects."

3. Semble, per *Patteson J.*, that, where the settlement relied on is a derivative one from the pauper's father, whose alleged settlement is by apprenticeship, the examination should give the date of the apprenticeship.

ON appeal against an order of two justices, removing *Elizabeth Winter* from the parish of *Spaxton*, in *Somersetshire*, to the parish of *Lydeard St. Lawrence*, in the same county, as the place of the last legal settlement of *William Winter*, the husband of *Elizabeth*, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The examinations of *William Winter* the younger, the pauper's husband, and *William Winter* his father, upon which the order of removal was made, were as follows.

"The examination of *William Winter*, now confined in *Wilton* gaol, in the said county, for felony. Taken" &c. "I am about twenty-five years old. I was born

"The examination of *William Winter*, now confined

in *Wilton* gaol, in the said county, for felony. Taken" &c. "I am about twenty-five years old. I was born

(a) See p. 607., ante.

in the parish of *Lydeard St. Lawrence*, as I have heard and believe: I have done no act whereby to gain a legal settlement on my own account. About *January* last I was removed, by an order of removal, from the parish of *North Cadbury*, in the said county, to the parish of *Lydeard St. Lawrence*, in the said county, the last legal place of settlement of my father *William Winter*, as I have heard and believe. I have a wife," &c.

[1841.]

The QUEEN
against
The Inhabit-
ants of
LYDEARD
ST. LAWRENCE.

"The examination of *William Winter*, now residing" &c., "as to the settlement of his son *William Winter*; who saith as follows. My son, *W. W.*, hath not, to the best of my knowledge and belief, gained any legal place of settlement on his own account. My parents were legally settled, as I have heard and believe, in the parish of *Lydeard St. Lawrence*. I was born in the parish of *Lydeard St. Lawrence*, as I have heard and believe (a). I was bound apprentice by indenture with *John Hurley* of *Fitzhead*, shoemaker; but it was agreed, in the indenture of apprenticeship, that I should serve the last forty days of my apprenticeship in the parish of *L. St. L.*: and I served the last forty days of my apprenticeship in *L. St. L.*, with *Aaron Hurley*, my master's father. I have had relief from the overseers of *L. St. L.* My son *W. W.* was removed in *January* last, by an order of removal, from the parish of *North Cadbury*, in the said county, to the parish of *L. St. L.*, as the last legal place of his settlement. I was examined before the magistrates as, to the last legal place of settlement of my son when the order of removal was made."

(a) No objection was taken to the hearsay evidence of the father as to his parents' settlement, or his own birth; but neither of these facts was proved at the sessions.

[1841.]

—
The QUEEN
against
The Inhabit-
ants of
LYDEARD
ST. LAWRENCE.

The following were the grounds of appeal, applicable to this part of the case.

Because the said *Wm. Winter* and the said *Elizabeth Winter* are not, and never were, legally settled in *L. St. L.*, as set forth in the examinations of the said *W. W.*, *Elizabeth* his wife (a), and *William Winter* his father.

Because it does not appear, by either of the said examinations, when or in what manner the said *Elizabeth Winter* became legally settled in *L. St. L.*

Because it is not true that the said *William Winter*, the father, was bound an apprentice by indenture with *John Hurley* of *Fitzhead*, shoemaker, nor that he, the said *William Winter*, did serve the last forty days of his alleged apprenticeship in *L. St. L.* with *Aaron Hurley*, his master's father, under any indenture of apprenticeship, or with the consent of the said *John Hurley*.

Because it does not appear, in either of the said examinations, that the said *William Winter*, the father, at any time served the said *Aaron Hurley* by the consent of the said *John Hurley*, or in any other manner, under any indenture of apprenticeship, nor when, or by whom, or for what term, the said *W. W.*, the father, was bound apprentice by indenture with *John Hurley* as in the said examination of *W. W.*, the father, is alleged, and which said *John Hurley* in the said examination is described as of *Fitzhead*, shoemaker; and there is no person of that name and description now, or at or about the date of the said order, residing at *Fitzhead*, nor any person of the name and description of *Aaron Hurley*,

(a) It did not appear from the case that *Elizabeth Winter* was examined.

father

father of *John Hurley*, now, or at or about the date of the said order, residing in *L. St. L.*; and the said examinations are too general, and are wanting in sufficient particularity in each of these last-mentioned respects.

[1841].

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The QUEEN
against
The Inhabit-
ants of
LYDEARD
ST. LAWRENCE.

Because no examination, or any copy thereof, has ever been sent to the overseers of *L. St. L.*, proving or setting forth, upon oath of any credible witness, when or where the said *W. W.* the son was born, nor his age.

The only examinations sent to the appellants were the examinations hereinbefore set forth.

On the evidence produced at the trial of the appeal, the Court found that the father, *William Winter*, resided and served the last forty days of his apprenticeship in *Lydeard St. Lawrence*, with *Aaron Hurley*, his master's father, with his master's consent, under a valid indenture of apprenticeship, bearing date 5th April 1789, produced by the respondent parish from the custody of *William Winter*, the father. The Court also found that *William Winter*, the son, was born in *Lydeard St. Lawrence*.

The question for this opinion of this Court was, whether the respondents were at liberty to go into these grounds of removal, or either of them, under the above examinations. The appellants objected to any evidence being received on these points: but the sessions received it, subject to the opinion of this Court. If the Court should be of opinion that the sessions were right in receiving the evidence, the order was to be confirmed: if otherwise, to be quashed.

Moody and *Fitzherbert*, in support of the order of sessions. The respondents proved two settlements of the pauper's

[1841.]

—
 The QUEEN
against
 The Inhabit-
 ants of
 LYDEARD
 St. LAWRENCE.

pauper's husband, one through his father, the other (in default of the former) in himself. The father's settlement was established by apprenticeship. It will be said that the examination does not shew that the apprenticeship of the father conferred a settlement, because the residence in *Lydeard St. Lawrence* was under a service which, if not performed with the master's consent, could confer no settlement by apprenticeship; and that the examination shews no such consent. But the appellants cannot take this objection. An examination may be insufficient, either from its totally failing to shew some necessary ingredient, or from its stating one too generally. Here the notice points, not to the omission of any necessary ingredient, but to the want of particularity. These are distinct heads of objection: the first prevailed in *Regina v. Middleton in Teesdale* (a), the second in *Regina v. Bridgewater* (b), and *Regina v. The Justices of the Eastern Division of Sussex* (c). Objections of the first sort rest upon want of jurisdiction in the removing justices, as was said in *Regina v. Middleton in Teesdale* (a): an objection of the second kind points only to want of particularity in what is actually stated, and of course admits that the facts stated would, but for the want of particularity, shew jurisdiction. It would be otherwise if, as in *Regina v. Middleton in Teesdale* (a), there were a general objection that the examination was bad on the face of it. This distinction is the more important, because it is held that, as to the degree of particularity required in each case, the opinion of the sessions is conclusive, or nearly so: *Regina v. The Justices of the West Riding of*

(a) 10 A. & E. 688.

(b) 10 A. & E. 693.

(c) 10 A. & E. 682.

Yorkshire (a). [Coleridge J. The sessions can exercise that judgment only when there is a fact stated; if the fact be not stated at all, the objection as to want of particularity cannot be understood to apply to such a fact. Now, here, the fact is not stated at all: it is consistent with every thing alleged in the examination that the service should have been without the consent of the master. If you proved the consent, you proved matter not in the examination.] Further, if the consent be necessary, it is alleged, though not technically. The statement of a witness will not be construed according to the rules of special pleading. It was agreed in the indenture that the service should be performed as it was in fact. This the examination states; and then it goes on, "and I served the last forty days" &c. If the word "accordingly," which probably a pleader would have inserted, be added, this will be a direct statement of the service in pursuance of the consent of the master expressed in the indenture; and no doubt this was intended by the party under examination. It is now settled that there is no distinction as to the strictness required respectively in an examination and a statement of grounds of objection (b); but the meaning of particular expressions must of course be ascertained by reference to the degree of information possessed by the person using them, and his habits and station. The finding of the sessions is decisive in favour of the respondents, if the notice of the objection is capable of the meaning for which the respondents contend. The omission to give the date of the indenture is cured by its not

[1841.]

THE QUEEN
against
The Inhabit-
ants of
LYDARD
St. LAWRENCE.

(a) 10 A. & E. 685.

(b) See *Regina v. The Justices of the West Riding of Yorkshire*, 10 A. & E. 685.

appearing

[1841.]

The QUEEN
against
The Inhabit-
ants of
LYDEARD!
St. LAWRENCE.

appearing that the sessions thought that material;
Regina v. Bridgewater (a).

Then, as to the birth-settlement of the husband. The objection pointed to is, that the husband is not a credible witness, being confined for felony. But the facts do not raise the objection. Even the absence of any statement, by the removing justices, that they knew of the witness being a convict, would defeat the objection; *Regina v. Alternun (b).* [Patteson J. I have no idea that the appellants here meant to suggest such an objection. The objection is, that it does not appear when or where the son was born, except by his own statement. He could not know these facts: and they do not ask his father, who probably knew, and was examined. How could the sessions be justified in finding the fact of the husband's birth, when it appeared that the father had not been questioned as to that fact before the removing justices, though he was present?] No case has ever gone so far as to authorise rejecting the evidence of a pauper who says he was born in a certain parish, and is of a certain age. The objection to the hearsay evidence is not distinctly raised. It is objected, that the facts are not proved or set forth "on the oath of any credible witness:" but the husband, whose credibility is not impeached, does set them forth; though, it is true, he adds, "I have heard and believe." *Regina v. Ecclesall Bierlow (c)* will be cited on the other side. But there the hearsay evidence did not disclose the nature of the settlement; and the generality with which the settlement was stated appears to have influenced Patteson J. in his decision (d). The Court

(a) 10 A. & E. 693.

(c) Antè, p. 607.

(b) 10 A. & E. 699.

(d) See pp. 610, 611.

cannot

cannot there have meant that the sessions can find no fact of which there was not sufficient evidence before the justices. If so, the question at sessions will be, not whether the facts can now be proved, but whether, on the evidence given before the removing justices, they were then proved. This was never so understood before stat. 4 & 5 W. 4. c. 76.; for evidence was always admitted at sessions without enquiring whether such evidence had been given before the removing justices. And the statute, sect. 81, merely precludes the sessions from receiving evidence of "grounds of removal" not "set forth" in the order or examination. The birth-settlement is here "set forth" as a ground of removal, even if it be supported by insufficient evidence. The statute does not exclude new evidence. The object was to save expense by limiting the matters in issue. If this objection prevail, it will next be objected that parol evidence was given before the justices of the contents of a written instrument, that sufficient search was not made, that witnesses were interested, &c. And the objections, according to the analogy of trials at Nisi Prius, will not be cured by the additional evidence which is not questionable. The justices have no power to summon witnesses, or compel the production of documents. If the evidence of a party as to his own birth is not received, the consequence will be that a birth can be proved by no one who did not see the actual delivery. Here, it does not appear that the father would have supplied the requisite proof. [*Coleridge J.* Supposing the husband might swear to the time and place of his own birth, does he do so here?] He says all that a man can say as to his own birth. [*Coleridge J.* In *Rex v. Trowbridge*

[1841.]

The QUEEN
against
The Inhabit-
ants of
LYDEARD
ST. LAWRENCE.

[1841.]

THE QUEEN
against
The Inhabit-
ants of
LYDEARD
ST. LAWRENCE.

v. Trowbridge (a) it was held to be no evidence of birth in a parish, that a party first recollected himself there at four years old.] If the order be quashed upon these grounds, there will be no power of removing this pauper hereafter to the appellant parish; and the respondents will be fixed; *Regina v. Clint (b)*.

(a) 7 B. & C. 252.

Saturday,
June 5th, 1841.

(b) The QUEEN against The Inhabitants of CLINT.

Pauper was removed from *B.* to *C.* on an examination of himself, stating a settlement by occupying a tenement from June 1827 to June 1828. This was denied by the notice of objections; and, on appeal, the occupation appeared to be from June 1828 to August 1829; whereupon the sessions quashed the order. Afterwards, the same pauper was removed from *B.* to *C.* on a fresh examination of himself, stating the settlement as before, but with the right dates. The order was objected to, on the ground that the former order was conclusive between *B.* and *C.*

Held, that it was so: and, the sessions having affirmed the order, this Court quashed the order of sessions.

ON appeal, at the *Michaelmas* quarter sessions for the West Riding of Yorkshire, 1840, against an order of two justices, dated 24th June 1840, removing *John Lar*, his wife and children, from the township of *Birstwith* to the township of *Clint*, both in the West Riding, the sessions confirmed the order subject to a case. By the case, it appeared that an order removing the pauper, his wife and children, from *Birstwith* to *Clint* had been made on 8th May 1839, on an examination of the pauper which set up a settlement in *Clint* by renting, &c., a tenement on which the pauper (according to his examination) entered in the beginning of June 1827, and of which he gave up possession about the end of June 1828. Notice of objection was served, stating, as a ground, that the pauper did not bond fide rent, &c., from the beginning of June 1827 to the latter end of June 1828. On the hearing of the appeal at the *Summer* sessions for the West Riding, 1839, it appeared that the pauper entered in June 1828 and left in August 1829. The sessions held the variance material, and discharged the order. In *Trinity* term 1840, this Court discharged a rule nisi for a mandamus commanding the justices to enter continuances and hear the appeal; *Regina v. The Justices of the West Riding of Yorkshire* (10 A. & E. 685., where the name of the appellant parish is misprinted). The second order of removal was founded on a fresh examination of the pauper, stating an occupation of a farm in *Clint*, on which he entered about the beginning of June 1828, and which he gave up in August 1829. Notice of objection was served, stating the ground before mentioned, with an alteration of dates; and, also, "that a former order, made by two" &c., "for removing the said *John Lar*" &c. "from *Birstwith* aforesaid to *Clint* aforesaid, was discharged by the Court of Quarter sessions, held" in July 1839, "on an appeal presented by the said township of *Clint* against such order of removal, and which said order of Court related directly to the settlement of the said *John Lar*" &c., "on the day of the date of the said former order of removal, which is the same settlement now in question between the parties to the present appeal; and it is therefore binding and conclusive between them so far as respects the place of the last legal settlement of

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Kinglake, contra, was stopped by the Court.

[1841.]

Lord DENMAN C. J. I think the appellants have given the notice of the grounds of objection required by

The QUEEN
against
The Inhabit-
ants of
LYDEARD
ST. LAWRENCE.

John Lax," and his wife and children; "it being admitted, on the copy of the examination of *John Lax*, the father, sent to the appellants along with the order of removal now appealed against, that the said *John Lax*, the father, has not done any act to gain a settlement subsequent to the date of the former order of removal." [This admission did not appear in the case stated, except from the absence of any allegation of a subsequent settlement.] The question for this Court was, whether the former order of removal was conclusive; if so, the order of sessions was to be discharged; if not, to be affirmed.

Wortley, in support of the order of sessions. First, the former order is conclusive only as to the settlement at the time; *Rex v. Wick St. Lawrence*, 5 B. & Ad. 526. Here it does not appear that the settlement relied upon was that to which the former order related, but the contrary. The ground on which all the cases, from *Rex v. Osgathorpe*, Bur. S. C. 261., downwards, have proceeded is, that a decision on the question at issue by a competent tribunal is conclusive between the same parties. Here the question is not shewn to be the same; at any rate, the respondents were entitled to shew that it was different. [*Coleridge J.* The question was as to the settlement alleged.] The settlement alleged in the second order has never been decided on: the sessions, in the first appeal, excluded evidence of it, because the statute did not permit them to enquire into it. They held it to be a different settlement from that set forth on the first examination. Secondly, the first order was quashed, not on the merits, but on a point of form. Sect. 81 of stat. 4 & 5 W. 4. c. 76. precludes the respondents from going into any ground of removal not set forth in the examination: but it does not prevent them from going, on a second appeal, into grounds set forth on a second examination. The error in the first examination was a formal objection to the discussion of the merits. *Rex v. Cottingham*, 2 A. & E. 250., shews the distinction between quashing on the merits and for informality. In *Rex v. Church Knowle*, 7 A. & E. 471., the respondents, at sessions, quashed their own order, because of a defect in the examination; and that was held conclusive: but here the court of quarter sessions, on a formal objection, prevented the enquiry into the settlement which is subsequently set up. The case resembles that of an informal notice of appeal. [*Coleridge J.* There the question is never entertained.] Nor was it here. [*Patteson J.* The sessions, on the first appeal, decided against the settlement proved, because it varied from
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[1841.]

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The QUEEN
against
The Inhabit-
ants of
LYDEARD
St. LAWRENCE.

the act, and that the objection ought to have prevailed. The examination states a settlement in the appellant parish by residence and service there to *Aaron Hurley* by the pauper's husband, while apprenticed to *John Hurley*. That would give no settlement without a consent by *John Hurley*: but the consent is not stated; and the objection to the want of such statement is properly made. Then, as to the birth-settlement. The appellants object that no examination has been sent, setting forth, "upon oath of any credible witness," when or where the pauper's husband was born, nor his age. It is said that, when we look at the notice of objections, and the view which the appellants there appear to suggest, the objection to the evidence received having been on hearsay is not properly raised. I think it is. If there be no evidence but hearsay, there is, in effect, no evidence at all, and therefore no evidence upon the oath of any credible witness. Where a witness says that such and such facts exist, "as I have heard

that in the examination. *Coleridge J.* Suppose the appellants had tried to set up a subsequent settlement, they would have been prevented from doing so if it was not stated in their notice of grounds: would not that have been a decision on the merits?]

R. Hall and Pickering, contra, were stopped by the Court.

Lord DENMAN C. J. The new act makes this case essentially different from *Rex v. Wick St. Lawrence*, 5 B. & Ad. 526. The removing parish must be cautious in sending notice of the settlement which is to be relied on: and the appellants have a right to bind the respondents to that settlement. It is said that this is hard and unjust: but I think there would be more hardship in allowing experimental removals on imperfect statements, which might leave one party free to prove any case, and wholly mislead the other.

PATTERSON, WILLIAMS, and COLERIDGE Js. concurred.

Order of sessions quashed.

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and believe," and that is the only evidence of the facts before the removing justices, the court of appeal cannot receive evidence of the facts at all. It is argued that loose evidence may be received before the justices, and afterwards, on appeal, the defect be made good by proper evidence: but I think that, when the evidence taken before the removing justices is questioned, the objection to it, if valid, must prevail, whatever inconveniences follow. I do not believe that any inconveniences will follow. Justices may compel the attendance of witnesses within their jurisdiction; and, if a difficulty arose from the witnesses being out of the jurisdiction, this Court could supply the defect. I am of opinion, therefore, that, in the sense in which the question is put to us by the sessions, they were not right in receiving the evidence.

[1841.]

The QUEEN
against
The Inhabit-
ants of
LYDEARD
ST. LAWRENCE.

PATTESON J. The examinations here are open to many objections: and the notice sufficiently draws the attention of the respondents to them. The respondents, therefore might easily have withdrawn the order of removal, and have supplied the defect by obtaining sufficient evidence: but, as they chose to go on, they must abide by the examination. One objection is that the examination does not shew that the service in the appellant parish was with the consent of the master. The magistrates at sessions were aware of this defect, and have noticed it in the case. The removing magistrates were also, I have no doubt, aware of the defect. Then, as to the birth-settlement, the objection made is that it is not proved on the oath of a credible witness. The objection, if contemplated, that the witness was a convict, is not raised by the notice of objections as it now

[1841.]

The QUEEN
against
The Inhabit-
ants of
LYDEARD
St. LAWRENCE.

stands. We must take the objection to be that there was not legal evidence when or where the husband was born. The justices had in their hands the means of inquiring, because the husband's father was present. Besides, no date was given to the indenture. I do not say that, whenever an indenture is stated, the date must be given. Yet here the importance of the date appears from this, that there is no legal impossibility (though much improbability) in an apprenticeship of the father commencing after the son has been emancipated. But why should the justices keep back the date of an indenture when they have it before them? I feel very strongly that, by holding most strictly to the necessity of a proper examination, we shall keep the justices to regularity, and shall thus prevent a pauper from being removed merely because he appears before the justices and says he has a settlement.

WILLIAMS J. When the Court decided, in *Regina v. Middleton in Teesdale (a)*, that an objection to an examination, as bad on the face of it, must prevail if there be any defect in the examination, they in effect decided this case. No peculiar relaxation of the rule which excludes hearsay evidence exists in the case of proof of birth, as the counsel for the respondents contend: they must have met with instances where birth-settlements have failed, because they rested merely on the remembrance of the party himself. A statement by a person that, when he first recollects, he was living in any place, is no proof that he was born there. If such evidence failed because the party might have changed

(a) 10 A. & E. 688.

his residence in the first four years from his birth, why might he not have done so in the first three, two, or one? As to the apprenticeship, I understand the counsel for the respondents to support it on the ground that the indenture provided for a service in the appellant parish for the last forty days; from which they propose to infer the consent of the master to the service with the particular individual in that parish. This, however, does not appear to me satisfactory. The provision in the indenture, alluded to, does not, I think, amount to proof of such consent to a particular service as is requisite to gain a settlement. I am of opinion that the intention of the act was that all practicable particularity should be given to the examination.

[1841.]

—
The QUEEN
against
The Inhabit-
ants of
LYDEARD
ST. LAWRENCE.

COLERIDGE J. The ground of the decision in *Regina v. Middleton in Teesdale (a)* was that no settlement was shewn on the face of the order: in *Regina v. Bridgewater (b)* the ground was that, though the facts necessary to give a settlement were stated, they were not stated with sufficient particularity; and, with respect to this last, where the objection is that the statement is not sufficiently particular, the fact must be stated in some way or other; and then only it is that the sessions are called on to judge whether there is sufficient particularity. The two classes of cases are very distinct; and the present ranges itself under *Regina v. Middleton in Teesdale (a)*: no sufficient ground of removal is stated. As to the apprenticeship, the notice of objections points specifically to the want of allegation of consent by the apprentice's master. It is true that

(a) 10 A. & E. 688.

(b) 10 A. & E. 693.

[1841.]

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 The QUEEN
against
 The Inhabit-
 ants of
 LYDEARD
 St. LAWRENCE.

afterwards there is an objection to the want of particularity; but that does not do away with the objection before specified. Then, as to the birth, I understand the fifth objection to be that it does not appear, by the oath of any credible witness, when or where the husband was born. That clearly will comprehend the objection that there is no evidence to the facts upon oath. But then it is argued that the magistrates may remove on hearsay evidence of birth. To this I cannot agree. I will not lay down a general rule: but suppose this man to have been the only witness, and to have merely said, "I have heard that I was born in that parish:" clearly that would not do. It is argued that we should not apply the strict laws of evidence to cases determined before such a tribunal as that of the two removing magistrates. I cannot enter into a discussion as to the inconveniences which may arise, such as that of the inability to summon witnesses. That is a question, not for us, but for the legislature. Suppose some other fact to be in question, — an apprenticeship, for instance, — and the parties applying for the order of removal to say that they had asked the master to attend, who had refused: would it then be enough for them to state what the master had been heard to say? Here then is a necessary fact not legitimately proved. I limit myself to the case now before us: I do not say whether, if there were other sufficient evidence warranting the removal, the admission of improper evidence would vitiate the order: at present my opinion is that it would not.

Order of sessions quashed.

[1841.]

Ross *against* CLIFTON and Others (a).[Monday,
May 10th,
1841.]

CASE. The first count of the declaration stated that, before and at the time &c., a certain dwelling-house, with the appurtenances, was in the possession and occupation of *Tomsett*, as tenant to plaintiff, the reversion expectant on the determination of such tenancy belonging to plaintiff; and that, before and until and at the time &c., there was, and of right &c., and still of right &c., a drain running from, along, and by the said dwelling-house to a certain common sewer, through which drain the refuse water, &c., from the said dwelling-house, during all the time aforesaid until &c., was used and accustomed and of right ought to flow and be carried away; yet defendant, well knowing &c., on &c., wrongfully and unjustly &c., with bricks and other building materials, stopped up, narrowed, and obstructed the said drain, and continued the same so stopped up &c., whereby &c. (stating various consequential injuries to the reversion). The second count alleged that the rain-water from the roof of the said dwelling-house ought of right to descend and fall into the said drain, and also that there was and ought to be &c. a chimney leading out of a certain room of the said dwelling-house, through which the smoke from the said room used and ought to pass away; yet defendant, wrongfully &c., erected and built up bricks and other materials upon and against a wall, parcel of the said dwelling-house, and continued the said bricks &c., whereby the wall was weakened, and the passage of rain-water from the roof and smoke from the chimney was obstructed &c.

Where a statute enables defendants to plead the general issue and give the special matter of defence in evidence, the plea of Not guilty so pleaded is not affected by the New Rules of *Hil. 4 W. 4.*, but operates as before they were framed, putting in issue not only the defences peculiar to the statute, but all that would have arisen at common law.

Therefore the Court, in the exercise of its discretion under stat. 4 *Ann. c. 16. s. 4.*, will not give leave to plead Not guilty "by statute," together with a special plea, although such plea raise a defence independent of the statute.

(a) See p. 607., antè.

[1841.]

 ROSS
 against
 CLIFTON.

Pleas. 1. Not guilty. 2. To the first count, denying the tenancy and plaintiff's reversionary interest. 3. To the first count, that there was not, nor of right ought to have been, nor still &c., the said alleged drain in the first count mentioned, nor was the refuse water, &c., in that count mentioned, used or accustomed, nor ought the same of right, to flow, &c., through the said drain, in manner &c. 4. To the second count, denying the tenancy and plaintiff's reversionary interest. 5. To the second count, as to the descent of rain-water, denying that the rain-water did or ought to flow and be carried away &c., in manner &c. 6. To so much of the second count as regarded the wall, that the same was not the wall of and parcel of the said dwelling-house, in manner &c. All the pleas concluded to the country.

The defendants, before pleading, applied to *Alderson B.*, on summons, for leave to plead the above pleas, but with the words "By statute" in the margin of the plea of Not guilty, according to *Reg. Gen. Trin. 1 Vict. (a)* The learned Judge, on the authority of a late case in the Court of Exchequer (*b*), rejected the latter part of the application, and gave leave only to plead the pleas without annexing the words "by statute" to the first. He added, however, that the defendant might apply to the Court for leave to amend by inserting the words. The pleas were delivered as above set forth, and in *Easter term (April 16th)*, 1841,

Warren moved for leave to amend the first plea, by adding the words "by statute;" and he stated that the defendants relied upon provisions in the Building Act,

(a) 8 A. & E. 279.

(b) See the cases cited in the argument, post.

14 G. 3. c. 78. s. 47., as to party-walls, and on the provisions as to notice, and the limitation of actions in s. 100. of the same statute; but that they also wished to avail themselves of defences not furnished by the statute, and which, since the new rules of pleading, could not be raised under the general issue. (He referred to several cases, which were discussed more fully on shewing cause.) In the same term (a),

[1841.]

Ross
against
CLIFTON.

Shee Serjt. and *Chambers* shewed cause. The adjudication of *Alderson* B. at chambers was correct, and agreeable to former decisions. In *Neale v. M'Kenzie* (b), a case in which the defendant was entitled, under stat. 11 G. 2. c. 19. s. 21., to plead the general issue and give the special matter in evidence, he proposed to plead Not guilty, and a justification for entering to distrain; but the Court of Exchequer held that he was precluded from doing so by the New Rules, *Hil. 4 W. 4., General Rules and Regulations*, 5. (c); which, on the one hand, are prevented, by stat. 3 & 4 W. 4. c. 42. s. 1., from interfering with the right to plead the general issue and give the special matter in evidence, when conferred by any statute, and, on the other, prohibit pleas "founded on one and the same principal matter, but varied in statement, description, or circumstances only." Lord *Lyndhurst* C. B. said there: "You must make your election. If you plead the plea of the general issue

(a) *April 22d.* Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js. A like motion was made, under the same circumstances, in *Tomsett v. Clifton and Others*, an action brought against the same defendants by the tenant in possession for the same acts of alleged wrong.

(b) 1 *Cro. M. & R.* 61. *S. C.* 4 *Tyr.* 670. The defendant ultimately pleaded Not guilty as to the force and arms and whatever &c., and specially to the rest. 4 *Tyr.* 672. note (a).

(c) 5 *B. & Ad.* iii.

[1841.]

 Ross
 against
 Clifton.

given to you by the statute, you must take it with all its inconveniences. We have been obliged by the statute to except from the operation of the new rules cases in which the right of pleading the general issue is given to parties by statute. It has been said, that the defendant was entitled to these two pleas before the new rules, and that the new rules make no difference; but he was not so entitled without the leave of the Court, which has always had the power of limiting the party to the general issue if they think fit. You must make your election, but you may have twenty-four hours to do it in." So in *Fisher v. The Thames Junction Railway Company (a)*, where, by a local act, the company were enabled to plead the general issue and to give the act and special matter in evidence, and that "the act complained of was done in pursuance of or by the authority of the statute" (words nearly the same as the corresponding ones of stat. 14 G. 3. c. 78. s. 100.), the Court of Exchequer held that the company must elect to plead the general issue or plead specially, although they urged that the proposed pleas (traversing the plaintiff's interest) turned on matter not within the clause of the local act. [Coleridge J. Suppose the defendants here wished to plead the Statute of Limitations. Could they give that matter in evidence under the general issue? The spirit of the new rules is that the defendant shall not plead the same thing twice over: that is done where, in a case like the present, the parties plead what, by a particular statute, might be proved under the general issue.] The cases decide, without qualification, that parties can in no instance plead a special plea with the general issue

(a) 5 Dowl. P. C. 773.

[1841.]

 Ross
 against
 Clifton.

by statute. In *Wells v. Ody* (a), to a declaration in case for building near plaintiff's ancient windows so that he was prevented from using his premises as he otherwise might, and a lodger had given notice to quit, the defendant pleaded Not guilty, and, at nisi prius, relied upon the Building Act, insisting that no notice of action had been given pursuant to sect. 100. Lord Abinger C. B. said: "A second objection was, that the injury complained of is justified by the Building Act, or if not, that the defendant is protected by the limitation of time, and by the want of due notice of action. Neither of these objections can be maintained. The Building Act was intended to prevent any action of trespass or case from being brought against a person for doing the precise things which are authorised by that act to be done, and was not intended to apply to cases not contemplated by the act, nor to collateral transactions, but to the injuries naturally and immediately arising from the acts of the parties." According to the argument now used, it might have been contended there that the defendant ought not to have been confined to the general issue, because it might exclude part of his defence, if the declaration extended to consequential injuries which the Building Act did not touch. [Lord Denman C. J. We need not enter into such distinctions here. One of the questions in this case is, whether the plaintiff was entitled to the reversion. To plead the general issue under the Building Act is, in effect, like setting out expressly all the matter of defence which the act contains; but that would not include the defence in question. *Patteson J.* Before the New Rules, the plea of

(a) 1 M. & W. 452. S. C. Tyr. & G. 715.

[1841.]

Ross
against
CLIFFTON.

Not guilty, in an action of this kind, let in every defence. But now it does not; and it would seem that the plea Not guilty "by statute" puts in issue every thing contained in the statute, but nothing more. Lord *Denman* C. J. If it had ever been decided that Not guilty "by statute" let in every defence, the case would be different; but such a ruling could hardly be correct.] A defendant need not plead the general issue under a statute: if he does, he must take the consequences. He might omit the general issue, and plead specially the limitation of actions and any other defence given by the Building Act. • [Coleridge J. What do you say is meant by giving "the special matter" in evidence?] *Haine v. Davy* (a) shews that it means proving all matters necessary to the defence, and that a statutory plea of Not guilty obliges the plaintiff to prove all the material averments in the declaration. [Lord *Denman* C. J. There the plea was simply Not guilty, which, as *Patteson* J. observed, did, in that case, put the whole matter of defence in issue. The plea of Not guilty "by statute" is different. *Patteson* J. There it was necessary to the defence, under the plea of Not guilty, to shew, not only that the defendants were overseers, but that they distrained goods which the statute 43 *Eliz. c. 2.* entitled them to distrain, that is *Read's*, and not the plaintiff's. Without such proof, the statute would not have justified them. But no Judge, in that case, said any thing warranting the assumption that a plea of Not guilty "by statute" obliges the plaintiff to prove any averment in his declaration.] In the first case of *Wells v. Ody* (b) *Gurney* B. held, at

(a) 4 A. & E. 892.

(b) 2 Cro. M. & R. 128. ; and see p. 131. S. C. 5 Tyr. 725.

Nisi Prius, that the defendant, on a plea of Not guilty under the Building Act, might dispute the plaintiff's property in the wall said to have been damaged. [Lord Denman C. J. It has been doubted whether the Judges had power to make a rule limiting the statutory right of pleading Not guilty; and it may be a very important question whether they could do so, if the result is to convert a general plea into a special one.] The introduction to the New Rules, *Hil. 4. W. 4.*, shews that there was no intention to take away the statutory privilege in that respect, the framers of the rules being sensible that they were not authorised to interfere with it (a). The insertion of the words "by statute," according to the subsequent rule, is only a notice to the plaintiff. Then, looking at this application simply as one made under stat. 4 *Ann. c. 16. s. 4.*, for pleading several matters, *Legge v. Boyd* (b) is a decisive authority against granting the rule. There it was proposed to plead Not guilty "by statute," with a special plea; and *Erskine J.*, on summons, had refused to allow the special pleas unless the words "by statute" were struck out. A rule for rescinding his order was discharged, and *Tindal C. J.* said, "If this had been *res integra*, I should have felt considerable doubt, whether the special plea, desired to be put on the record, as well as the plea of the general issue, would have fallen within the rule of Court which regulates the putting different pleas on the record; although, certainly, the object and effect of that rule is to prevent the lengthening of the record by the pleading of various pleas, having reference

[1841.]

 ROSS
 against
 CLIFTON.

(a) 5 B. & Ad. 1. See the observation of Alderson B. in *Wells v. Ody*, 2 Cro. M. & R. 132.; 5 Tyr. 730.

(b) 9 Dowl. P. C. 39.

[1841.]

Ross
against
CLAYTON.

to the same subject-matter of defence." But he then referred to *Neale v. M'Kenzie* (a) (which, as well as *Fisher v. The Thames Junction Railway Company* (b), was cited in argument), and added, "The case still brings us back to the question, what is the sound construction of the statute of *Anne*? It seems to me, that if the party has availed himself of the advantages proceeding from pleading the general issue, he should not also be allowed to plead specially." And *Maule J.* said (c), "The statute 4 *Anne*, c. 16. s. 4, enables parties by leave of the Court to plead several matters: that leave was always necessary; if it had been a matter of right, it would have so continued. The Court being then competent to say what may, and what may not, be pleaded in this particular case, as well as all others, the only question is, whether the Judge has here done right in exercising his discretion. It is to be observed, that whenever a statute gives the power of giving several matters in evidence, under the general issue, that statute comprehends all the powers given by the statute of *Anne*. The rule by which the Courts have been guided, appears to be this, that they consider the general issue, when pleaded 'by statute,' as the mode taken by the defendant of shewing, that he intends to give evidence under the statute, and not by pleading the facts specially. It would be giving the defendant an unfair advantage, if he had the power of doing both." Here the defendant pleads Not guilty under an act of parliament giving him the benefit of

(a) 1 Cro. M. & R. 61. S. C. 4 Tyr. 670.

(b) 5 Dowl. P. C. 773.

(c) *Chambers* cited this from 10 *Law Journal, N. S., Common Pleas Reports*, p. 20.

many

many defences and justifications ; and, even assuming that that plea does not put in issue other matters than those strictly within the statute, it would be hard that a defendant should have the advantage of putting in issue so many points of defence by his plea of Not guilty, and yet be entitled, by special pleas, to make the plaintiff prove all the material averments of his declaration. The Court, therefore, in the exercise of its discretion under the statute of *Anne*, will refuse to allow the several pleas.

[1841.]

Ross
against
CLINTON.

Warren, contra. The defendants are anxious only not to admit on the record the plaintiff's reversionary interest, and right to the wall and drain, &c. The plea of Not guilty "by statute" merely enables a defendant to plead generally those defences which the statute gives : he may still plead them specially ; and, if he did so, no judge would refuse him permission to plead other substantial defences independent of the statute. The principle on which cases of this kind must be decided is, that, where a statute authorises the compendious form of pleading, a party shall not plead the same matters specially. This is the regulation introduced, merely to avoid prolixity, by the new rules of pleading. Here the several proposed pleas do not involve the same matters. In *Haine v. Davey* (a) the disputed evidence was adduced on a point strictly relevant to the defence under the statute. *Neale v. M'Kenzie* (b) appears to have been shortly discussed, and does not shew satisfactory grounds of decision ; but it is consistent with the principle just stated. The defendant wished to plead

(a) 4 A. & E. 892.

(b) 1 Cro. M. & R. 61. S. C. 4 Tyr. 670.

[1841.]

Ross
against
CLIFFORD.

Not guilty, and a justification for entering as landlord to distrain for rent in arrear, which, by stat. 11 G. 2. c. 19. s. 21., was included in the plea of Not guilty. Yet such pleas were pleaded together in *Twigg v. Potts* (a). *Fisher v. The Thames Junction Railway Company* (b) was also a case decided on very little discussion, and the judgment appears to have been influenced by *Neale v. M'Kenzie* (c). It was there said, by *Alderson B.*, that, "If special pleas were allowed together with the general issue given by statute, it would deceive the plaintiff, who supposes that the defendant means to rely on the matters specially pleaded, and not to give others in evidence under the general issue:" but that argument has no force since the rule for inserting "by statute" in the margin. In *Legge v. Boyd* (d) the defendant wished to plead the general issue by statute, and, at the same time, to expand part of his statutory defence into a special plea: and, even there, *Tindal C. J.* seems to have doubted whether the proposed pleas might not have been admitted if there had been no prior decision on the point. "The special matter," in stat. 14 G. 3. c. 78. s. 100., means the precise defences furnished by that act; Lord *Abinger C. B.* so limits the construction in *Wells v. Ody* (e). The form of expression in that clause is more limited than in stat. 43 Eliz. c. 2. s. 19., which was discussed in *Haine v. Davey* (g). [Lord *Denman C. J.* If a defendant, before the late rule requiring the words "by statute," relied upon a statutory defence, and pleaded Not guilty, do

(a) 1 Cro. M. & R. 89. S. C. 3 Tyr. 969.

(b) 5 Dowl. P. C. 773.

(c) 1 Cro. M. & R. 61. S. C. 4 Tyr. 670.

(d) 9 Dowl. P. C. 39.

(e) 1 M. & W. 452. 460. S. C. Tyr. & G. 715. 724.

(g) 4 A. & E. 892.

you say that the plaintiff was not bound, in the first instance, to prove the fact complained of?] He was so found. The words Not guilty were a plea at common law, and also a plea by statute. The defendant said, in effect, "Prove your case, and I will prove the statutory justification." The New Rules leave the statutory effect of the plea untouched, but restrict that which it had at common law.

[1841.]

Ross
against
CLIFTON.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.

This was an action on the case for an injury to the reversionary interest of the plaintiff. The defendant has pleaded Not guilty, and other pleas traversing the material allegations in the introductory part of the declaration. He now seeks to add to the plea of Not guilty the words "By statute," in the margin, with the view of setting up a defence under the Building Act, which has a clause enabling the defendant to do so under the general issue; and he seeks also to retain his other pleas. The plaintiff opposes this on the ground that Not guilty "by statute" of itself puts in issue all the allegations in the declaration. An ingenious and very plausible argument was urged for the defendant, founded on a supposed double effect of the general issue; the one at common law, by which it puts in issue all the allegations of the declaration, the other by statute, which enables the defendant to give his special defence in evidence under it; and it was contended that the proviso in 3 & 4 W. 4. c. 42. s. 1. preserved only the latter effect, and that the New Rules had destroyed the former. The contrary was held by the Court of Exchequer in the case of *Fisher v. The Thames*

Junction

[1841.]

Ross
against
CLIFFORD.

Junction Railway Company (a), which was an action by a reversioner, and is directly in point. The same language was held by that Court in other cases. In conformity with that decision, we think ourselves bound to hold that the plea of the general issue, wherever the provisions of any act of parliament apply to it, is wholly unaffected by the New Rules, and must have the same operation as it had before they were made.

This rule may be made absolute for the insertion of the words "by statute" in the margin of the plea, upon payment of costs, and striking out all the pleas except that of Not guilty.

The rule drawn up was : That, on payment of costs by defendants, to be taxed &c., and striking out all the pleas but Not guilty, defendants should be at liberty to amend the last-mentioned plea by inserting the words "by statute" in the margin of the said plea. And that defendants should have a week's time to elect as to the terms aforesaid (b).

(a) 5 Dowl. P. C. 773.

(b) The defendants pleaded the pleas stated in the beginning of this case, not annexing the words "by statute" to the general issue. In Trinity term 1841, *Warren* obtained a rule to shew cause why the defendants should not be at liberty to add three special pleas founded on the Building Act; and in the same term, May 31st, *The Court* (Lord Denman C. J., Patteson, Williams, and Coleridge Js.), after cause shewn by *Shee Serjt.*, gave leave to add the following pleas: 1. Party-wall. 2. No notice of action, 3. Statutory limitation elapsed: such pleas to be delivered within three days, otherwise the rule to be discharged with costs, &c.

See the next case.

[1841.]

WILLIAMS *against* JONES and Another (a).[Friday,
June 18th,
1841.]

CASE by tenant against landlord for distraining where no rent was due, and for an excessive, and an irregular, distress. Plea, Not guilty "by statute" (b). On the trial, before Lord Denman C. J., at the *Anglesey* summer assizes, 1840, it appeared that the goods distrained were hay, grain, cattle, and agricultural implements on a farm rented of Lord *Newborough*. When the Lord Chief Justice had summed up the evidence, the defendants' counsel asked that the question might be distinctly put to the jury, whose property the goods were, there having been a contest on that point. His Lordship then said that the goods were clearly the tenant's; that the plaintiff appeared by the declaration to be the tenant; and that the defendant, by his plea, had admitted that allegation, and had not put the property in issue. He stated, however, that a part of the evidence, to which he referred, seemed decisive on this point. The jury afterwards inquired of his Lordship whether the pleadings compelled them to find that the goods were the plaintiff's property. His Lordship then stated, as his opinion, that the defendant had admitted the plaintiff to be tenant, because, under the new rules of pleading, the plea of Not guilty "by statute" admitted all the inducement, and denied only the grievance. But he added, that, in his opinion, the plaintiff was proved to be the tenant. Verdict for plaintiff. *Welsby*, in the ensuing term, obtained a rule nisi for a new trial, on the ground of misdirection.

The plea of Not guilty "by statute," pleaded under stat. 11 G. 2. c. 19. s. 21., in an action for an excessive distress, puts in issue, not only the matter of justification, but the tenancy, and ownership of the goods.

(a) See p. 607., antè.

(b) 11 G. 2. c. 19. s. 21.

[1841.]

WILLIAMS
against
JONES.

Jervis now shewed cause. [Lord *Denman* C. J. I thought that the plea put in issue nothing but the defence which the statute gave, and had not the general effect of an ordinary plea of Not guilty. But that construction of the rules has since been held erroneous.] Assuming the decision on the point of law to have been wrong, the Lord Chief Justice did leave the question of fact to the jury. But the pleadings were conclusive. *Haine v. Davey* (a), which may be considered an authority to the contrary, turned on a statute (43 *Eliz.* c. 2. s. 19.) very differently worded from stat. 11 *G. 2.* c. 19. s. 21. [Lord *Denman* C. J. The point has been much considered since, and was before this Court in a case lately decided. When that case came before us, we were all very much of opinion that the plea of Not guilty "by statute" had the effect I ascribed to it on the trial of this cause; and, at the time of the trial, I had no doubt on the point. But, on conference with all the Judges, we gave up our opinion to theirs; and we think we ought not to disturb what has been so settled. The sooner this is generally known the better. *Patterson J.* *Ross v. Clifton* (b) was the case decided in *Easter* term. Our opinion there was, that Not guilty "by statute" would put in issue the inducement as well as the other matter.]

Welsby then contended that the rule must be made absolute, the question of fact not having been properly submitted to the jury, but,

The Court (c) being of a different opinion, the rule was
Discharged.

(a) 4 & *A. E.* 892.(b) Page 631, *antè*.(c) Lord *Denman* C. J., *Patterson* and *Williams* J.

1840.

HILARY VACATION (a).

HORNIDGE *against* WILSON.

DEBT for rent by assignee of the reversion against assignee of the lease of a house.

The declaration stated that one *T. Cook*, being seised in fee of the premises, made a lease of them at *Lady-day*, 1818, to *T. Newberry* for twenty-one years, at the yearly rent of 148*l.*; that *Cook* devised his reversion to plaintiff and another, since deceased; and that the term vested by assignment in defendant, who entered; and that afterwards, to wit on 29th *September* 1835, 444*l.* became due from him for three years' rent. There was a second count for use and occupation.

Plea to the first count, except as to 14*l.* 6*s.* 6*d.* parcel &c., that plaintiff ought not to have his action against defendant, and that defendant ought not to be charged otherwise than as administrator of the said *T. Newberry*, because, during the term, the said *T. Newberry* died, and administration of his goods &c. was granted to defendant, whereby the term vested in him

In debt for rent against an administrator, as assignee of the intestate, defendant pleaded, in discharge of his liability otherwise than as administrator, that the intestate underlet, for an unexpired term, to a tenant who had become insolvent and unable to pay rent; that the premises were of less value than the rent, viz. of the value of a certain sum, part of which defendant had paid to plaintiff, and part towards the expense of a party wall under the Building Act (14 G. 3.

c. 78.); that, before the rent became due, defendant offered to surrender all his interest in the premises to plaintiff, who refused to accept them; and that he had fully administered &c.

Replication; that the premises were of more value than the sum mentioned in the plea, viz. of the value of the rent; and that defendant did not offer to surrender, &c. Issue thereon.

Held, that the real value of the premises, as against defendant, must be taken to be that which it would have been if he had not himself committed a breach of a covenant to repair in the original lease:

Held, also, that the value, as between plaintiff and defendant, was not affected by the insolvency of the undertenant, whose lease also contained a covenant to repair with a proviso of re-entry for breach and for non-payment of rent.

(a) The Court sat in banc, under stat. 1 & 2 *Vict.* c. 32. on the 1st, 3d, and 4th of *February*.

1840.

—
HORNIDGE
against
WILSON:

as such administrator, and not otherwise; that *T. Newberry* in his lifetime demised the premises, for a term of years then unexpired, to one *R. Ebsworth*, who was from thence, and still is, possessed of the premises under that lease; that the said *R. Ebsworth* was then, and had long been, insolvent and unable to pay his rent; and that the demised premises, from the time of granting administration hitherto, had been and still were of much less value, and had yielded much less profit to defendant, as administrator or otherwise, than the sum in the first count demanded, that is to say, had been of the value and had yielded the profit of 367*l.* 10*s.* only, and no more; and that defendant had paid 296*l.*, part thereof, to plaintiff for rent, and 57*l.* 3*s.* 6*d.* to one *C. Thacker* in respect of a party wall, rebuilt, since the grant of administration, between the premises and the adjoining house of *Thacker* according to the statute in that behalf; that before the rent became due defendant offered and tendered to plaintiff to surrender and give up all the estate, right, title, interest, term of years then unexpired, property, profit, claim, and demand of him, the defendant, as administrator as aforesaid or otherwise, which plaintiff refused to accept; and that defendant had fully administered all the goods and chattels of *Newberry*, and had not, at the commencement of the suit (*a*), or at any time since, any goods and chattels of *Newberry* to be administered &c. Notice of the premises to plaintiff. Verification.

Plea, as to 14*l.* 6*s.* 6*d.*, residue &c., payment of that sum into Court, which plaintiff accepted; and thereupon nolle prosequi was entered.

(a) See *Reid v. Lord Tenterden*, 4 *Tyr.* 111., cited post, p. 653. n. (b), as to the insufficiency of this averment.

Plea

Plea to the second count, *Nunquam indebitatus*; on which issue was joined.

Replication to the first plea, that, from the time of granting administration, the demised premises had been and still were of more value than the sum in that plea mentioned, to wit of the value of the rent mentioned in the first count; and that defendant did not offer or tender to surrender as alleged in the plea. Conclusion to the country, and issue thereon (*a*).

On the trial, before Lord *Denman* C. J., at the *London* sittings after *Trinity* term, 1836, a verdict was found for the plaintiff for 375*l.* 10*s.* 9*d.*, with leave for the defendant to move to enter a nonsuit, or such judgment as the Court should direct.

In the following term, upon a motion according to the leave reserved, the Court directed a special case to be stated, which was substantially as follows.

The lease stated in the declaration contained a general covenant to repair the demised premises and every part thereof, and to yield them up in good and tenantable repair at the end or other sooner determination of the term. It contained also a proviso of re-entry for nonpayment of rent or nonperformance of any covenants. *Newberry* died in *December*, 1829, and administration was granted to defendant 1st *February*, 1830. *Newberry* occupied the premises himself until the grant of the underlease to *Ebsworth*, after which he continued to occupy a part only until his death. After his death the defendant, his son, also continued to occupy a part, consisting of cellars. The under-lease to

(a) It was noticed by the Court that the replication would probably have been held bad on special demurrer, as tendering too large an issue.

1840.
HORNIDGE
against
WILSON.

1840.

—
HORNIDGE
against
WILSON.

Ebsworth was for twelve years, wanting ten days, from 25th *March*, 1827, at an annual rent of 210*l.* and in consideration of a premium of 450*l.*, with covenants and provisoes corresponding with those in the original lease. The underlease included a piece of ground on which a countinghouse was built, and which was rented of another party at 30*l.* a year. Defendant paid ten guineas a year to *Ebsworth* for the cellars, and received the rent of 210*l.* after the death of *Newberry* until *Michaelmas* 1831 either from *Ebsworth*, who died in 1828, or from his executrix, who occupied the premises afterwards. Since *Michaelmas* 1831, plaintiff had received from *Ebsworth's* executrix, with defendant's privity, 202*l.* 2*s.* 9*d.* in all, and given receipts as for rent received from defendant.

In 1831, *Thacker* rebuilt a party wall between the demised premises and his own, in pursuance of stat. 14 G. 3. c. 78. (a). In consequence of this, the roof became exposed, and the premises, which were before in good repair, became untenable, and could not be repaired for less than 400 or 500*l.* Until then, the rent had been regularly paid by *Ebsworth's* executrix to defendant, and by defendant to plaintiff; but after *Michaelmas* 1831 the executrix became insolvent, and had paid no rent to defendant.

The rent in arrear to the plaintiff, when the action was brought, was 375*l.* 10*s.* 9*d.*; viz., 444*l.* for three years' rent, due *Michaelmas* 1835, deducting a sum of 54*l.* 2*s.* 9*d.* paid by a distress in 1834, and 14*l.* 6*s.* 6*d.* paid into Court. If in repair, the house would be worth 150*l.* a year, according to the terms of the lease. In its present state very little rent could be got for it,

(a) See *Thacker v. Wilson*, 3 A. & E. 142.

and

and a tenant, who was to put it in repair, would require a long term. After the rebuilding of the party wall the defendant had been willing to surrender to the plaintiff; and in the summer of 1832 he informed the plaintiff that he had no assets from *Newberry*, and offered to give up the lease, saying that he could get no rent for them and would have nothing to do with them; but plaintiff refused to receive the premises or to release defendant. On 5th *June* 1835 the defendant served the following notice on the plaintiff's attorney, who was also the attorney of *Mary Cook*, the widow of the original lessor, for whom the plaintiff was a trustee.

"To Mrs. *Mary Cook*, or personal representatives of the Rev. *T. Cook*, clerk, deceased: Whereas by an indenture of lease bearing date 25th *March* 1818, and made between the Rev. *T. Cook* of the one part and *T. Newberry* of the other part, a messuage, tenement, or dwelling and premises, with the appurtenances, being No. 54. in *Fleet Street*, in the city of *London* aforesaid, were demised to the said *T. Newberry* for a term of twenty-one years at the yearly rent of 148*l.*; and whereas the said *Thomas Newberry*, by indenture bearing date 21st *June* 1827, demised the said premises with others to *R. Ebsworth*, of *Fleet Street* aforesaid, optician, from 26th *March* then last past, for the term of twelve years, wanting ten days, at the annual rent of 210*l.*; and whereas I, the undersigned *C. W. Wilson*, have taken out letters of administration of the estate and effects of the said *T. Newberry*, and whereas all the assets of the said *T. Newberry* have been exhausted in payment of specialty debts of the said *T. Newberry*; now therefore I do give you notice that the said lease, made

1840.

 HORNINGER
 against
 WILSON.

1840.
 —
 HORNIDGE
 against
 WILSON.

to the said *T. Newberry* as aforesaid, is of no value to me as such administrator of the said *T. Newberry*, and that I do hereby abandon all and every my right and interest as such administrator in the said lease and the premises thereby demised, and that I am ready and willing and hereby offer to execute a surrender thereof or to assign the remainder of my term and interest, as such administrator, in the said premises at any time when thereunto required, subject to the said underlease. Dated 22d June 1835. Yours &c., *C. W. Wilson*."

The questions for the opinion of the Court were, whether the plaintiff was in this action entitled to recover the arrears of rent so due, or any part thereof. If so, the verdict was to stand, and judgment to be entered accordingly. If not, the verdict was to be set aside and a nonsuit entered, or the judgment for the plaintiff was to be arrested.

The case was argued at the sittings in banc in *Michaelmas* vacation 1838 (a).

W. H. Watson for the plaintiff. The first question is, whether the defendant has succeeded in proving that part of his plea which alleges the premises to be of less value than the rent for which they were let. In proof of this he shews that they are worth less in their present state, and that he cannot get any rent from his tenant. The insolvency of his tenant is no excuse; for the defendant might have ejected him for nonpayment of rent, and have substituted a better tenant. It is nothing to the plaintiff that his lessee has taken a premium and put in an insolvent undertenant. The executor of

(a) November 29th. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

a farmer

a farmer might as well set up the neglect of himself or his testator to plough or till the land and thereby to obtain any profit from it. As to the depreciation of the house by want of repair, the defendant is bound by the original lease to do repairs, and the undertenant is under the same obligation. To set up the want of repair as a defence is to take advantage of his own wrong. It is as if he had pulled down the house, and then pleaded the want of value. The question is simply one of value, and not of profit actually reaped, as appears by *Bolton v. Canham* (a), *Buckley v. Pirk* (b), and *Rubery v. Stevens* (c), in which last case the law and authorities are elaborately discussed by the Court in giving judgment. Now the special case expressly finds that the premises are worth 150*l.* a year if put in repair, that is, if the defendant had done his duty; for it was held in *Tremeere v. Morison* (d) that, if an administrator enter and be chargeable as assignee, he is liable on a covenant to repair.

Then the defendant attempts to shew a discharge for part of the admitted value by a payment under the Building Act. But it was decided in *Thacker v. Wilson* (e) that the defendant, as owner of the improved rent, is liable to this expense, and that his landlord is not the party liable. The plaintiff is, therefore, at all events entitled to judgment on this plea, though no issue has been taken on the payment. As to the alleged offer to surrender, the defendant has not offered to make, nor could in fact make, an absolute surrender; for the underlease is still outstanding.

1840.

—
HORNIDGE
against
WILSON.

(a) *Pollexf.* 125. 131.(b) 1 *Salk.* 316.(c) 4 *B. & Ad.* 241.(d) 1 *New Ca.* 89.(e) 3 *A. & E.* 142.

1840.

HORNIDGE
against
WILSON.

Cowling, contra. The question is whether, since the grant of administration, the premises have been of less value than the rent claimed by the plaintiff. In proving this issue, it matters not how they became of less value. If the want of value was caused by the non-repair, the plaintiff should have replied by confessing and avoiding the statement in the plea, and shewing the liability of the defendant to do repairs, and that the premises would have been of greater value if the repairs had been done. The amount of rent is no criterion of value, which may fluctuate from various causes. In such cases the executor is liable only in respect of profits actually received: 2 *Williams on Executors*, 1248, 2d ed. note (y). *Remnant v. Bremridge* (a) is in point. There an administrator, being charged as assignee in an action for use and occupation for rent due after the death of the intestate, was held to be discharged on proof that the estate was insolvent, that the premises had been unproductive to him, and that he had verbally offered to surrender them. [*Patteson J.* That case is unintelligible to me as reported.] It is consistent with other cases, and with the doctrine in the note to *Jevens v. Harridge* (b). If, indeed, the defendant had depreciated the property by a devastavit, such as pulling the house down or neglecting to take proper means of deriving a profit from it, it would have been a different case. But no question of waste was left to the jury. Supposing the point of the defendant's liability to repair to be open on these pleadings, it may be observed that no former decision had gone so far as *Tremeere v. Morison* (c), which seems to be unsatisfactory in prin-

(a) 8 *Taunt.* 191. *S. C.* 2 *B. Moore*, 94.

(b) 1 *Wms. Saund.* 1. n. (1).

(c) 1 *New Ca.* 89. A writ of error was brought, which was dropped in consequence of a compromise.

ciple.

ciple. In *Reid v. Lord Tenterden* (a) the opinion of the Court appears to have been that an offer to surrender an unprofitable lease would have been an answer to an action against the executor, as assignee, for non-repair in his own time, if pleaded properly. The ancient practice was to sue executors in the detinet only, for arrears subsequent to, as well as before, the testator's death. *Hargrave's Case* (b) first decided that in an action of debt for subsequent arrears the writ might be in the debet and detinet; a decision founded on the principle that he is liable at all events in respect of the profits, and cannot plead *plenè administravit*. In *Boulton v. Canon* (c) and in *Sewell v. Young* (d) the executor was considered to be "as it were an assignee" by reason of his receipt of the profits. Since that time, it has been the practice for a plaintiff, who elects to sue an executor as assignee, to state the assignment generally without calling him executor; as in *Tilney v. Norris* (e). But the extent of his liability is not altered by the form of action, though the mode of pleading his defence is different. If *Tremere v. Morison* (g) be law, an executor, who acts, cannot escape personal liability for non-repair to the end of the term; for, as the breach is a continuing one, if the premises are out of repair at the death of the testator, the mere devolution of them on the executor in that state fixes him with a breach for which he is chargeable as assignee. Nor can he avoid this liability by refusing to enter; for the possession of an under-tenant is *his* possession quoad the landlord. There

1840.

 HORNIDGE
 against
 WILSON.

(a) 4 Tyrw. 111. The fourth plea in that case, which was the only one containing an averment of want of assets, was held bad for not shewing a deficiency before action brought.

(b) 5 Rep. 31 a.

(c) 1 Freem. K. B. & C. P. 337.

(d) 2 Keb. 819.

(e) Carth. 519. S. C. 1 Ld. Ray. 558.

(g) 1 New Ca. 89.

seems

1840.

—
 HORNIDGE
 against
 WILSON.

seems no reason why he should not be protected from liability on covenants to repair, as well as to pay rent, where he has no assets and has offered to restore the premises to the lessor. As to the contribution towards the expence of the party wall, it is clear from the judgment of the Court in *Thacker v. Wilson* (a) that it is a lien on the rent, and that the tenant is entitled to deduct the amount.

W. H. Watson, in reply. It is true that the value of premises may fluctuate from various causes, and that the executor is liable only to the extent of the real value; but the causes that affect his liability must be such as are not under his own controul. It is admitted by the defendant that a devastavit would not entitle him to an abatement of the rent; yet in what does a deterioration of value, occasioned by culpable neglect, differ from waste? If his situation exposes him to difficulties, he has voluntarily submitted to them by taking out administration instead of leaving the estate to the creditors. As to his alleged willingness to surrender the premises, it amounts to nothing but an offer to give up the reversion of an underlease, with the right of bringing ejectment against an insolvent tenant.

Cur. adv. vult.

In this vacation (*February 4th*), the judgment of the Court was delivered by

Lord DENMAN C. J. This was an action of debt for rent against an administrator as assignee of the demised premises. The issue was on the value of the premises, which was alleged to be less than the rent reserved, and

(a) 3 A. & E. 142.; see pp. 149, 150.

on the offer of the defendant to surrender them to the plaintiff. With respect to the value, it is clear that an administrator who has fully administered and is chargeable with no default or laches, may discharge himself from liability to a greater extent than the real value; but we think that the real value, as against one who takes to the premises and accepts rent for them after the death of his intestate, must be taken to be that which the premises would have been worth but for his own act. If the defendant had performed the covenant to repair, which, according to *Tremeere v. Morison* (a), he was liable to do, it is admitted that they would have been worth at least as much as the rent. He cannot, therefore, under the circumstances of this case, take advantage of his own wrong by availing himself of a reduction of value occasioned solely by the want of repair in his own time. As to the nonpayment of any rent by the underlessee, the plaintiff has nothing to do with that. The value of the premises, as between him and the defendant, is not affected by it.

With regard to the deduction claimed by the defendant in respect of the payment towards the expense of the party wall, it is enough to say that, if he is entitled to the deduction at all, he cannot have the advantage of it [on the present record].

The verdict must therefore stand for the amount of rent found by the jury.

S.

Judgment for the plaintiff (b).

(a) 1 *New Ca.* 89.

(b) It is observable that only one of the pleas in *Tremeere v. Morison* (1 *New Ca.* 89.) contained an averment of plenè administravit, and of an offer to surrender. The third plea contained no such averments; nor was there any in *Tilney v. Norris* (1 *Ld. Ray.* 553.), cited and relied on by the Court in *Tremeere v. Morison*. In the report in *New Ca.* no distinction appears to have been made between the pleas.

1840.

—
HORNIDGE
against
WILSON.

1840.

Saturday,
February 1st.

The QUEEN against The Inhabitants of
WAINFLEET, ALL SAINTS.

A parish apprentice, bound for seven years to *A.*, served him for four years, when *A.* agreed with *B.*, who carried on the same business in another parish, that the pauper should work for *B.*, *B.* paying 5s. a week to *A.* out of the pauper's earnings: The pauper accordingly went and continued to work for *B.* till the end of his apprenticeship, with the exception of ten days when he was sent for by *A.* to assist him during illness. *B.* paid *A.* at the rate agreed upon, deducting for the ten days' absence during *A.*'s illness:

Held, there being no consent of justices, that this was a "placing out" or "putting away" of the apprentice, within 56 G. 3. c. 139. sect. 9., and that no settlement was gained by the service under *B.*

ON appeal against an order of two justices for the removal of *M. Houlden*, his wife and child, from the parish of *Wainfleet All Saints*, in the parts of *Lindsey* in the county of *Lincoln*, to the parish of *Alford* in the same parts, the court of quarter sessions quashed the order, subject to the opinion of this Court on the following case:

By indenture bearing date the 14th of *June* 1819 the pauper *M. Houlden*, then above the age of nine years, was duly bound as a parish apprentice for the space of seven years to *Rossiter Smith* of the parish of *Alford*, tailor. Pauper served his master in *Alford* under the same for about four years, when the master, not having employment for the pauper, agreed with one *W. Brooks* of *Wainfleet All Saints*, a draper employing tailors in his business, that the pauper should do tailor's work for *Brooks* upon the terms that *Brooks* should pay *Smith* 5s. a week out of the pauper's earnings. *Wainfleet All Saints* is distant from *Alford* fifteen miles. The apprentice went accordingly to work for *Brooks* in *Wainfleet All Saints*, where he continued to work and inhabit (except for an interval of ten days, which occurred about nine months after he went to *Brooks*), up to the time of removal. Previous to those ten days *Smith* became ill, and sent to the pauper to assist him. The pauper went and did assist him during his illness, which lasted ten days. When *Smith* had recovered the pauper returned to *Brooks*. The 5s. a week were duly paid by *Brooks*

to

to *Smith* to the end of the apprenticeship, except during the aforesaid period of ten days, for which an allowance was made. The indenture expired while the pauper was working for *Brooks* and inhabiting at *Wainfleet All Saints*, where he continued to reside to the time of the removal. No assignment of the indenture was made, nor was the consent of any justices obtained for such service at *Wainfleet All Saints*. The question for the opinion of the Court was, whether the apprentice obtained a settlement in the parish of *Wainfleet All Saints* by such service there.

1840.

The QUEEN
against
The Inhabit-
ants of
WAINFLEET,
ALL SAINTS.

Whitehurst and *Wildman* in support of the order of sessions. The question is, whether the pauper gained a settlement by serving under his second master, *Brooks*, in the parish of *Wainfleet*, or whether the stat. 56 G. 3. c. 139. s. 9. prevented it. But for that statute, it is clear a settlement was gained. The words of the statute are obscure (a); and are remarkably varied. It speaks of
“ placing

(a) Section 9 is as follows. “Whereas it may be expedient that those, to whom parish apprentices are bound or assigned, should be empowered to place out or assign over such apprentice to others, and it is proper that such placing out or assignment should, in all instances, be under the inspection and controul of the magistrates; and it is fit that the person to whom such putting out or assignment shall be made, and also the apprentice, shall be made subject to the ordinary jurisdiction of justices of the peace with respect to masters and parish apprentices; and it is inexpedient that any master or mistress should, in any way, discharge or dismiss from his or her service any parish apprentice without the consent of such justices; be it therefore enacted, That from and after the 1st October 1816, it shall not be lawful for any master or mistress to put away or transfer any parish apprentice to any other, or in any way to discharge or dismiss from his or her service any parish apprentice without such consent of justices as is directed in an act passed in the thirty-second year of the reign of his present Majesty, entitled An Act for the further Regulation of Parish Apprentices; and that no settlement

1840.
 ———
 The QUEEN
 against
 The Inhabit-
 ants of
 WAINFLEET,
 ALL SAINTS.

“placing out,” “assigning over,” “putting out,” “putting away,” and “transferring;” besides “discharging” and “dismissing.” Upon the whole, the expressions import an absolute and permanent transfer for the residue of the term, and not a mere letting out of the services of the apprentice from week to week as in this case. If the original master is in a condition to recall the apprentice to his service, as was done here in case of need, it is not within the statute. Sect. 10, (a) which fixes the penalty for a violation of the preceding enactment, uses only the words “put away” or “transfer,” and thereby proves that the words “place out,” and “putting out” in sect. 10 are not to be taken in another or different sense than “putting away,” and “transferring.” The previous statute, 32 G. 3. c. 57. is in *pari materiâ*, and explains the meaning of the words used in the latter statute; and it is clear from sect. 7 and schedules D. and E., that this earlier act contemplates only an absolute assignment for the whole remaining period. Any other construction would disable a master from permitting his apprentice to work with another person for a single week, or even a day, and would expose him to the penalty mentioned in sect. 10 of 56 G. 3. c. 139. In *Rex v. Shipton* (b) the pauper consented to leave his master, and his subsequent service was under no inden-

settlement shall be gained by any service of such apprentice after such putting away or transfer, unless such service shall have been performed under the sanction of such consent as aforesaid.”

(a) Sect. 10. enacts, “That any person or persons who, after the 1st day of October 1816, shall put away or transfer any parish apprentice to another, or who shall in any way discharge or dismiss from his or her service any parish apprentice without such consent as aforesaid, shall forfeit a sum not exceeding 10*l.* for every apprentice so transferred.”

(b) 8 B. & C. 88.

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tures at all. The well known distinction between an assignment and an underletting in the case of leases seems applicable to this case. If it be a question of fact whether the act of the first master be a "placing out," then the sessions have in effect found that it was not so.

1840.

—
The QUEEN
against
The Inhabit-
ants of
WAINFLEET,
ALL SAINTS.

N. Clarke contra. *Rex v. Shipton (a)* is in point. The distinction between this statute and the former is there adverted to in the argument of *Campbell*, and sanctioned by the court. The words "place out" are larger than "assign" or "transfer." [Lord Denman C. J. Section 10 does not seem to have been brought under the notice of the court in that case.] The language of that section is not essentially different. [He was stopped by the Court.]

LORD DENMAN C. J. The 10th section, imposing a penalty on any person who shall "put away or transfer" a parish apprentice without the proper consent, certainly furnishes something like an argument in favour of the construction contended for in support of the order of sessions; but, upon the whole, the object of the statute is, that nothing shall be done with reference to the service under the apprenticeship without the sanction of the justices. It would contravene the policy of the act if we were to hold that this was not within the 9th section.

LITLEDAL J. Three things are prohibited by the statute; namely, an assignment; a discharge; and a placing out. This is a case of "placing out" with an-

(a) 8 B. & C. 88.

other

1840.

—
 The QUEEN
against
 The Inhabit-
 ants of
 WAINFLEET,
 ALL SAINTS.

other master and of "putting away" within the words and meaning of the act.

WILLIAMS J. The object of the enactment, as recited in the 9th section, is to submit the transfer or placing out of the apprentice to the inspection and controul of the magistrates; and this object has been sufficiently carried into effect by the words of the act. It confides to them the selection of the person by whom the apprentice is to be taught. The intention of the legislature would be defeated if this were not held to be a "putting away" within the meaning of the act. There is nothing in the case to shew that the service of the apprentice with *Brooks* was limited to a weekly service.

COLERIDGE J. I entertain some doubt, but not enough to warrant me in differing from the rest of the Court.

S.

Order of sessions quashed.

1840.

COLE *against* CRESSWELL.Monday,
February 3d.

ASSUMPSIT on a promissory note for 26*l.* 15*s.* made by defendant, payable to plaintiff or order. Counts for goods sold, use and occupation, and on an account stated.

Plea, as to 17*l.* 14*s.* 7*d.* parcel of the monies mentioned in the first count, that the note was made by defendant and delivered to plaintiff on the faith and for the purpose of plaintiff paying, for and on account of defendant, divers sums of money due and owing from defendant to divers persons, to wit, 4*l.* 18*s.* 2*d.* to one *T. J.*, 10*l.* 14*s.* 5*d.* to one *W. T.*, 1*l.* 14*s.* to one *E. M.*, and 8*s.* to one *J. S.*, amounting in the whole to the sum of 17*l.* 14*s.* 7*d.*, parcel &c.; and plaintiff then took and received the promissory note, as to the said sum of 17*l.* 14*s.* 7*d.*, on the terms and understanding and for the purpose aforesaid, and no other, and then promised defendant to pay and discharge the same in manner aforesaid, but has not paid the said several sums parcel &c., or any of them, to the several parties above mentioned or any of them, but the same are wholly unpaid; and defendant is liable to pay the same; and that, except as to the sum of 9*l.* 0*s.* 5*d.*, no consideration had been received by defendant, or given by plaintiff, for the note. Verification.

Assumpsit by payee against maker of a promissory note: Plea, as to part, that the note was delivered to plaintiff for the purpose of his paying, on defendant's account, certain debts of defendant to his creditors; that plaintiff took it on the terms and understanding, and for the purpose aforesaid, and then promised defendant to pay the said debts in manner aforesaid; and that no consideration was received by defendant or given by plaintiff for the note. Replication, that the note was made and delivered to plaintiff, at the request of the creditors, for the purpose of paying them so soon as defendant paid the note; *without this* that plaintiff promised to pay

the said debts as alleged in the plea. Issue joined on the special traverse. At the trial, plaintiff proved the inducement of his replication, and had a verdict:

Held, that the issue was a material one; that the evidence entitled the plaintiff to a verdict on such issue; and that there appeared on the record a sufficient consideration to entitle the plaintiff to judgment.

1840.

COLL
against
CRESSWELL.

Plea, as to 9*l.* 0*s.* 5*d.* residue of the same monies, payment; upon which issue was joined.

Non assumpsit to the rest of the declaration, and issue thereon.

Replication to the first plea, that defendant, at the request of the persons in the plea mentioned, made and delivered the promissory note to plaintiff, who took and received the same, as to the said sum of 17*l.* 14*s.* 7*d.* at the like request of those persons, for the purpose of paying to them the sum of money in which defendant so stood indebted to them, so soon as defendant should have paid the said promissory note; *without this*, that plaintiff promised defendant to pay or discharge the the said sum of money so due and owing from defendant, as in the plea alleged. Conclusion to the country and issue thereon.

On the trial before *Alderson B.* at the *Gloucester* Spring assizes, 1838, plaintiff proved that, defendant being indebted to plaintiff in the sum of 9*l.* 0*s.* 5*d.*, and to the parties named in the plea in the several sums there mentioned, it was agreed by all parties that defendant should give plaintiff a bill for the joint amount of the several debts, and that, upon receipt of the money when due, plaintiff should pay himself and the other creditors out of the proceeds. The defendant produced no evidence, and the jury found a verdict for the plaintiff on all the issues.

R. V. Richards, in *Easter* term following, obtained a rule to shew cause why the verdict should not be reduced to 9*l.* 0*s.* 5*d.* and interest thereon; or why judgment should not be arrested on the whole record or on the first issue, on the ground that, except as to 9*l.* 0*s.* 5*d.*, there was no consideration; or why a repleader should not be awarded.

Ludlow

Ludlow Serjt. and *Busby* shewed cause. There is no ground for the rule. The plea states a failure of the consideration for which the note was given, which is there alleged to have been an absolute promise to pay the debts of the defendant to certain persons. This promise is traversed by the replication, which sets out the real facts in the introductory part of it, and shews that the promise was contingent upon the payment of the note by the defendant. The result is that the plaintiff consents to receive the note, and its proceeds when paid, in trust for payment of the different creditors, including himself. This is a sufficient consideration to support the action on the note, and the plea is negatived in a material allegation. A replender can be awarded only where the issues after verdict found upon them are such that the Court can give no judgment upon them. Here there is no difficulty in seeing upon the whole record that the plaintiff is entitled to judgment. He is entitled also to judgment for the whole amount of the note; for there can only be one action on it; and when the plaintiff has received the amount, he may then be called upon to hand over to the creditors the amount of their several debts; *Evans v. Cramlington* (a); *Reid v. Furnival* (b).

1840.

 Cole
 against
 Cresswell.

R. V. Richards contra. It is not necessary to deny that a trustee for third parties may sue on a bill or note, but the plea alleges the plaintiff to be a trustee for the defendant himself. This, if true, is a complete answer. It shews a want of consideration. If the plaintiff intended to deny this, the defendant should have shewn a considera-

(a) *Carth.* 5.

(b) 1 C. & M. 538.

1840.

 COLK
 against
 CRESSWELL.

tion : instead of doing so, he admits the want of consideration, and only denies a promise which is the legal result of the facts stated in the previous part of the plea. The plea shews no liability of the plaintiff to third persons, and until such liability appears he is merely a trustee for the defendant. The proper form of replication would have been either to deny that there was no consideration, or to deny that the plaintiff took the note on the terms and for the purpose set forth in the plea. There must therefore be a repleader, or judgment must be arrested as to so much of the first count as is answered by the first plea.

Lord DENMAN C. J. The plaintiff denies the promise to pay *as alleged* in the plea : that is, to pay the defendant's creditors on the terms and understanding there stated. The terms proved were that they should be paid by the plaintiff upon receipt of the amount of the note from the defendant. The issue is therefore material, and is properly found for the plaintiff. Under the circumstances proved, the plaintiff was a trustee for payment of the defendant's debts, and this was a sufficient consideration for the note.

LITLEDALE J. The note *prima facie* imports a consideration. The plea, in effect, asserts that the defendant gave the note to the plaintiff for the purpose of paying the defendant's creditors, and that they have not been paid. The replication denies this, and asserts that the note was given in consideration that the plaintiff should pay the creditors when the defendant himself had paid the amount to the plaintiff. Such an undertaking to pay on receipt of the money is a good consideration.

WILLIAMS

WILLIAMS J. The plea shews a receipt of the note in trust for the defendant. The replication denies this, and changes the position of the parties by shewing a trust for the creditors, under which the plaintiff will be bound to pay to them part of the sum recovered. The rest is due to himself (*a*).

S.

Rule discharged.

(*a*) *Coleridge J.* was absent at *Nisi Prius*.

1840.

COLL
against
CRESSWELL.

ELLISON against ISLES.

Monday,
February 3d.

TRESPASS. The declaration charged that defendant, on &c., broke and entered a close of plaintiff, which was described in the declaration by name and abutments.

Plea, that, before and at &c., there was, and of right ought to have been, a certain common and public highway, into, through, over, and along the said close in which &c., in the said declaration mentioned, for all the liege &c. (justifying under the use of a public footway).

New assignment, that plaintiff commenced &c., not for the trespass in the plea &c., but for that defendant, on &c., out of the said common and public highway in the plea mentioned, and upon other occasions and for other purposes &c., broke and entered &c.

Pleas to new assignment. 1. Not guilty. Issue thereon.

2. That, before and at &c., plaintiff had wrongfully and injuriously stopped up and obstructed the said high-

To a declaration in trespass quare clausum fregit, defendant pleaded a right of way in the close in which &c.; plaintiff new assigned extra the way in the plea mentioned to which defendant pleaded that plaintiff obstructed the way in the plea mentioned, wherefore defendant deviated; plaintiff replied *De injuria*.

Held that, on this record, plaintiff was entitled to apply the evidence to a way across the close which he admitted, and which had not

been obstructed; and that defendant could not prove his case by shewing that another way which he claimed across the close, which was disputed by plaintiff, had been obstructed.

A judge should not, even by consent of parties, allow an issue to be tried which the record does not properly raise, unless the parties will amend the pleadings. *Per Patteson J.* at *Nisi Prius*.

1840.

 ELLISON
 against
 ISLES.

way in the said plea mentioned, that is to say, by then locking and fastening, and keeping locked and fastened, a certain gate in and across the same, and by then putting and placing, and keeping so put and placed, divers bushes and fences upon and about the said gate, so that, by means thereof, defendant could not, before or at the said times when &c., go, pass, and repass, in and along the said highway, and use and enjoy the same: wherefore defendant, at the said times when &c., being a liege &c., did go and pass in and along the said highway, until he came and arrived at the said obstructions; and, being then desirous of continuing to go and pass in and along the said highway beyond the said obstructions, and being hindered and prevented so doing by the said obstructions, did, in order to avoid those obstructions, and to get as speedily and by the nearest route that he could back again into the said highway in a part of the same beyond the said obstructions, necessarily and unavoidably go and pass a little out of the said highway, in and upon the nearest and most convenient part of the close and place next adjoining the same, and by the side thereof, as he lawfully &c.; and, in so doing, defendant broke &c., which are the said &c. Replication, de injuriâ. Issue thereon.

On the trial before *Patteson J.* at the *Wiltshire* Summer assizes, 1837, it appeared that there was in the plaintiff's close a public footway, running from east to north. This was not disputed on the part of the plaintiff. The defendant, however, claimed a right to use another public footway, which ran from south to north. The right to this way the plaintiff disputed; and, for the purpose of preventing any passage by it, he obstructed it. The defendant thereupon deviated. The plaintiff's
 counsel

counsel contended that, on these pleadings, the only question was, whether there had been any obstruction of the way which the plaintiff admitted, namely, that from east to north. The defendant's counsel contended that he was entitled to prove that the way from south to north was obstructed. The plaintiff's counsel, however, consented that the question should be tried, and a verdict found, as to the way from south to north: but the learned Judge refused to permit this, unless the pleadings were amended: to which the parties would not consent. His Lordship then directed that a verdict should be taken for the plaintiff. In *Michaelmas* term 1837, *Bompas* Serjt. obtained a rule nisi for a new trial. In *Trinity* term, 1839 (a),

1840.

ELLISON
against
ISLES.

Erle and *Manning* shewed cause. The verdict is properly entered. The defendant pleads a public right of way. Upon that, it was for the plaintiff to ascertain whether there was any such way; and, finding that there was, he was to new assign, that way not including the place in which he meant to prove the trespass. Had he traversed the right of way as pleaded, the defendant would have succeeded if he had proved any way. This appears from note (6) to *Greene v. Jones* (b), and especially from the cases there (c) put of trespass to a fishery, and of a claim of a right of way, and the remarks following. Then, when the plaintiff new assigned, he applied the plea to the right of way which he knew to exist. The defendant could not, by his plea, compel the plaintiff to elect between disputing that there was any right of way at all, and admitting that

(a) June 3d, 1839. Before Lord Denman C. J., *Littledale*, *Patterson*, and *Williams* Js.

(b) 1 *Wms. Saund.* 299.

(c) 1 *Wms. Saund.* 300 b, c.

1840.

—
ELLISON
against
ISLES.

there was a right of way besides that which he did not dispute. [*Littledale J.* referred to *Cocker v. Crompton (a)*.] There the plaintiff had named his close in the declaration; and it was holden (before the new rules) that the defendant, under a plea of *liberum tenementum*, could not shew that he had a close of the same name with that of the plaintiff. But here the way claimed is not named on either side: therefore, if the plea had been traversed, any way might have been shewn by the defendant. Then, the plaintiff having now assigned for a trespass extra *the way in the plea mentioned*, which way he admits, the defendant pleads that *the said way in the plea mentioned* was obstructed. The question therefore is, what way did the plaintiff admit, and was *that* way obstructed? The issue is on such obstruction, and no other. And no obstruction was shewn as to the way which the plaintiff admitted. According to the argument which must be urged on the other side, the defendant might have shewn that there was an obstruction on any part of the close. In *Scott v. Dixon (b)* the plaintiff declared for assault and imprisonment: the defendant justified under an arrest by legal process: and then the plaintiff replied that the defendants, after the arrest, released him, but took him again; “wherefore, as the defendants have acknowledged *the said* assault and imprisonment, he prays judgment” &c. The Court held that the plaintiff could not pray judgment in respect of the assault and imprisonment which was confessed, for that the plea avoided it; and that there should have been a new assignment. If, here, the plaintiff had replied that the defendant’s justi-

(a) 1 B. & C. 489. See *Lempriere v. Humphrey*, 3 A. & E. 181.

(b) 2 Wils. 3.

fication related to a particular way, and had described that way, and then denied the way so described, the replication would have been demurrable; for it would have been said that the plaintiff had no right to select a particular spot and limit the defendant's justification to that. The defendant, to the new assignment on this record, ought to have pleaded that there was a right of way besides that which was not in dispute between the parties. [*Littledale J.* You say that, if you had traversed the way pleaded in the first instance, the defendant might have proved any way. Now, following that out, is not the way to which the whole pleadings relate any way which the defendant might have chosen to select for proof on such a traverse?] If so, the defendant might have succeeded without merits, for he has one way without dispute; but that has not been obstructed, nor was the trespass committed there; and the defendant would only, as before pointed out, have to prove any obstruction in any part of the close.

Bompas Serjt. and Butt, contra. The defendant had no means of knowing to which way the plaintiff applied the plea, except from having himself acted in respect of the obstructed way, and having intended to refer to that in his plea. He might not know of the other way. [*Patteson J.* Could he have believed that the plaintiff meant to give up the right of way in respect of which the action was brought?] According to the rules of pleading, as they may be collected from note (6) to *Greene v. Jones (a)*, the plaintiff should, in his new assignment, have particularised the way to which he referred. [*Patteson J.* Then how would you have

1840.

 ELISON
against
Isles.
(a) 1 *Wms. Saund.* 299.

pleaded

1840.

 ELLISON
 against
 JAMES.

pleaded to such a new assignment?] Another right of way might have been pleaded. [*Patteson J.* Would you admit the extra viam in respect of the other?] The plea would have been in the nature of an explanation of the plea first pleaded. [*Patteson J.* I think you will find no such plea in the books: it amounts to pleading the old plea anew with an amplification.] It is laid down, in note (6) to *Greene v. Jones (a)*, that, "if the new assignment be in *other lands*, the plaintiff should give the place a name, if it have one, and otherwise describe it with the same certainty, as is now for the most part usual in declarations in trespass; and if it be in the *same land*, its abutments should be set forth in such a manner, as that a plain difference may be perceived between the place so new assigned and that mentioned in the plea." And, again (*b*), "So where a man claims a right of way, which is disputed by the owner of the close, and has committed trespasses in other parts, besides those in which he claims the way, if the defendant pleads a right of way, the plaintiff must traverse it, and further state in a new assignment that the defendant committed trespasses in other parts of the close. In cases where the plaintiff answers the plea and also new assigns, it is usual to aver in the new assignment that the action was brought as well for the trespass mentioned in the plea, as for the trespass which is new assigned. But where the plea does not at all meet the place in the declaration, but justifies the trespass in some other place of the same name, or otherwise, upon some legal ground of defence, the plaintiff makes merely a new assignment without tra-

(a) 1 *Wms. Saund.* 299 c.(b) 1 *Wms. Saund.* 300 c.

versing any part of the plea, for that would obviously be repugnant; in which new assignment care must be taken to describe the place with all its abutments by metes and boundaries, so as clearly to distinguish it from the place justified in the plea." [*Patteson* J. That applies where the parties are at cross purposes as to the close in which the trespass is charged to have been committed; but here their difference arises from their referring to different rights of way. I never heard of a new assignment extra viam with abutments.] The plaintiff might have new assigned a trespass elsewhere than in the way mentioned in the plea: he need not have new assigned extra viam. There can be no distinction between the case where different parts of the same close are referred to, and that where the parties are speaking of different closes. The plaintiff might have distinguished the parts of the close: a close is not necessarily confined to a single field. In note (c) to *Greene v. Jones* (a) it is said, "if the plaintiff reply to a plea of right of common, that the close mentioned in the declaration and plea has been inclosed twenty years, which the defendant traverses, the issue will be found for the defendant, if he can shew that any part of the close was inclosed within that time." As to *Scott v. Dixon* (b), the new assignment would properly have consisted of a statement of the recaption after the release, thus specifying precisely the matter complained of, as the plaintiff should have done here. *Cocker v. Crompton* (c) was decided upon the sufficiency of the description in the declaration. In *Freeston v. Crouch* (d)

1840.

 ELLISON
 against
 ISLES.

(a) 1 *Wms. Saund.* 299 b, citing *Hawke v. Bacon*, 2 *Taunt.* 156. See *Tapley v. Wainwright*, 5 *B. & Ad.* 395.

(b) 2 *Wils.* 3.

(c) 1 *B. & C.* 489.

(d) *Cro. Eliz.* 492.

the

1840.

ELLISON
against
ISLEA.

the defendant, in trespass, set out abutments and justified as of his freehold: the plaintiff new assigned, setting out new abutments; and the defendant rejoined that the place in the plea and that in the new assignment were the same: and, upon demurrer, the rejoinder was held to be bad, which was affirmed on error; and the majority of the Court said that, "When the plaintiff replies, and makes a new assignment, and saith, that it is *alias quam in barré*, then he waves that whereto the defendant hath pleaded: so as, if in truth it be the same thing, he can never take advantage thereof, but is estopped to give evidence in that, which the defendant hath pleaded, and therefore to that place newly assigned, the defendant should have pleaded in bar thereto, or ought to have pleaded not guilty." Here, therefore, the plaintiff is estopped from applying his evidence to a right of way other than that to which the plea refers. Now the close in which &c. is the close where the trespass was proved to be committed (a). So the way must be that which is obstructed. It is conceded that, if the plaintiff had traversed the plea of right of way, the defendant might have proved any right of way: then how does the admission in the replication differ from a denial, as to the meaning to be given to the plea which the replication answers? [Patteson J. There clearly is a difference; for you must admit that, if the new assignment specifies the locus in quo, it does not leave it at large as a traverse would.] It lies upon the plaintiff to specify, wherever the matter is left too general: *Com. Dig. Pleader* (3 M 34.). The defendant could not give the specification. [Patteson J. Why might he not have rejoined a second way which

(a) See *Bond v. Downton*, 2 A. & E. 26.

was obstructed?]. That would have been a departure: the plaintiff and defendant must, before the rejoinder, be taken to have agreed that a given way existed. In *Howell v. King* (a) it was holden that, if a man have a way over the ground of another to *Blackacre*, and use it in order to go through *Blackacre* to other land, it is a trespass (b); and from 1 *Roll. Abr.* 391. *Chimin Private*, (A), pl. 9., it seems that the plaintiff must shew this specially by way of new assignment.

1840.

 ELLISON
against
ISLES.
Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

This was a declaration for breaking and entering the plaintiff's close. The defendant pleaded a public footway in general terms. The plaintiff new assigned extra viam, and for other purposes, to which the defendant pleaded Not guilty, and, secondly, that the way mentioned in his plea was obstructed, wherefore he passed as near as he could. The plaintiff replied *De injuriâ*.

By this state of the pleadings, it is obvious that two issues only were raised. First, whether the defendant had gone out of the way which stood admitted; secondly, whether that admitted way was obstructed.

From the plaintiff's opening, it appeared that there was a public footway across the close in a direction from east to north, which was undisputed, and had not been obstructed; that the defendant claimed another public footway in a direction from south to north, which the

(a) 1 *Mod.* 190. See *Lawton v. Ward*, 1 *Ld. Ray.* 75.

(b) See also *Allan v. Gomme*, post, p. 760. And the new assignment in *Senhouse v. Christian*, 1 *T. R.* 560.

plaintiff

1840.

ELLISON
against
ISALES.

plaintiff denied, and had warned the defendant not to use; that the defendant had attempted to use it, and the plaintiff had obstructed it; whereupon the defendant had gone on one side; and the plaintiff had brought his action. Such being the agreed facts, each party claimed the verdict: the plaintiff contending that the way admitted by the pleadings was that from east to north, which had never been obstructed, but out of which the defendant had gone; the defendant contending that the way admitted was that from south to north, which had been obstructed.

The parties were willing to try the question as to the existence of the way from south to north: but the learned Judge refused to try it, unless the pleadings were amended, and such an issue raised, so that the jury might be sworn to try it. The parties would not amend; and he directed a verdict to be found for the plaintiff.

The real question in dispute undoubtedly was the existence of a public footway from south to north: and the point is, by whose fault it was that that question was not raised.

If the defendant had pleaded the truth at once, namely, that there was a public footway across the close (even without setting out the direction of it, which he was not bound to do), which footway was obstructed, and therefore he passed as near as he could, the plaintiff might safely have denied the existence of the footway: for the defendant would not have been allowed, upon that issue, to have applied his evidence to the undisputed way from east to north, which was not obstructed. But, as the plea stood, merely asserting a footway generally, it is obvious that, if the plaintiff had denied the way,
and

and the defendant had chosen to apply his evidence to the undisputed way (the issue lying upon him), the plaintiff must have failed. He was therefore compelled to new assign. Indeed, the defendant did not on the argument complain of this, but said that the plaintiff ought to have new assigned with particularity the precise part of the close and spot where the trespass was committed. Suppose he had done so, *ex concessis*, that spot would not have been in the line of the way claimed from south to north; and the defendant would have been just as liable to have misconceived the plaintiff's intention in not denying the way, as he was under the new assignment as it stands.

The defendant could not be ignorant of the existence of the way from east to north; neither could he really suppose that the plaintiff meant to admit on the pleadings the existence of the way from south to north, when he knew that the plaintiff brought his action on purpose to dispute and to try that very point. He ought, therefore, to have pleaded to the new assignment another public footway, which the plaintiff could have denied without fear of being turned round upon the pleadings. The plaintiff could not frame either his declaration or his new assignment so as necessarily to raise the question of right intended to be tried; whereas the defendant could, either in his original plea to the declaration, or in pleading to the new assignment, have raised the question without the slightest difficulty.

If the plea to the new assignment had not in terms referred to the plea to the declaration, but had merely said that *a way* was obstructed, and therefore he went as near as he could, possibly it might have been held that the replication *de injuriâ* might have involved the
denial

1840.

ELLISON
against
ISLES.

1840.

ELLISON
against
ISLER.

denial of a way as well as of an obstruction, and so the real point might have been tried.

But, as the plea to the new assignment states expressly that the way in the *defendant's plea above* mentioned was obstructed, and therefore he went aside, it fixed the alleged obstruction to be in the admitted way; so that the replication *de injuriâ* could not be taken to involve a denial of the way; for then there would be an admission and a denial of the same way on the same pleadings. If the trial had proceeded, and evidence had been gone into as to the way claimed from south to north, whichever way the verdict had gone, the plaintiff, if not actually estopped by it, would have great difficulty in ever again disputing the existence of that way with the defendant; for the way stands admitted on the pleadings; and, from the evidence adduced, it might always have been shewn that that way was from south to north. So now, if the verdict be for the defendant, on the facts conceded, the plaintiff will be in the same difficulty, because that verdict must proceed on the ground that the way referred to in the plea is that from south to north. But, if the verdict for the plaintiff stands, it must be on the ground that the way in the plea is that from east to north, which in truth never was in dispute; and the real question can be raised in another action.

Wherever the precise locality becomes material to the defence, it lies upon the defendant to fix it (a); which principle is applicable to the present case.

Upon the whole, we are of opinion that the fault lay with the defendant, and that the verdict is right.

(a) Note (3) to *Lowe v. King*, 1 Wms. Saund. 81 a.; note (3) to *Melior v. Walker*, 2 Wms. Saund. 5 b.

This rule must therefore be discharged, unless the defendant thinks fit to amend upon payment of costs; in which case we think he should be at liberty to do so, and the rule should be made absolute for a new trial upon payment of costs.

1840.

ELLMON
against
ISLES.

Rule accordingly.

The QUEEN *against* CREASE.

HENRY CREASE was rated to the poor of the parish of *St. Austell, Cornwall*, as the occupier and owner of "tolls of tin:" gross estimated rental, 1600*l.*; rateable value, 1600*l.*; rate, at 10*d.* in the pound, 40*l.* On appeal, the sessions reduced the assessment to 1400*l.*, and the rate to 35*l.*, subject to the opinion of this Court on a case, the material parts of which were as follows.

On appeal against a rate upon tolls of tin, the sessions stated a case, shewing that, by the custom of the stannaries, the right of working tin-mines in certain manors is vested in the owner of tin bounds, he paying the lord or his lessee one tenth of the tin gained: that the appellant, being the lord's lessee of the toll and farm of tin, granted to R., for a term, liberty to enter one of the said mines, and dig and search for tin there, and to

By indenture of 1st *August* 1815, between His Royal Highness the then Prince of *Wales* and Duke of *Cornwall* of the one part, and *Edward Smith*, Esquire, of the other part, His Royal Highness demised to *Smith*, his executors, administrators, and assigns, all that the toll and farm of tin or tin-toll which should be gained, arise, or be due, in any place or places within the several lordships, manors, precincts, or territories belonging to

carry away the tin, yielding, paying, and delivering to appellant from time to time, within six weeks after the return or sale of every parcel of tin gotten in the premises, 1*s.* in the pound on the gross value of all tin which should from time to time be so gotten: that R., at the time of the grant, was an owner of tin-bounds, within which the mine was situate: and that R. worked the mine after the demise, paying appellant 1*s.* in the pound, in money, according to the reservation.

Held, that the grant was a good and not a colourable demise, at least of the tin tolls, the sessions not finding fraud; that the 1*s.* reserved was a rent, and not a virtual share of the produce of the mine; and, therefore, that the appellant was not rateable in respect of it as an occupier.

But that, for tin toll received in kind from other mines, he was so rateable.

1840.

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The QUEEN
against
CREASE.

or being part or parcel of the Duchy of *Cornwall*, in *Cornwall*, and all profits &c., to the said toll &c., within the several lordships &c. aforesaid belonging, happening or arising, with their and every of their rights, members, and appurtenances; and also all the tin-mines found or to be found within the several enclosed lands of the said several lordships &c., with their and every of their rights &c.; and also all that the toll and farm of tin or tin toll which should be gained, arise or be due in any place or places within all and every the manors, boroughs, tenements, and premises thereafter particularly mentioned, parcel of the ancient or annexed possessions of the Duchy of *Cornwall*, in *Cornwall*, which, with the exception of all mines and minerals, had been sold to different persons under stat. 38 G. 3. c. 60., that is to say, within the manor of *Tewington*, with its members and appurtenances, whereof different parts were separately sold and conveyed &c. (mentioning the vendees and times of sale): habendum to *Smith*, his executors, &c., from *August 15th, 1810*, for ninety-nine years then next, if either of three persons named should so long live, at the yearly rent in that indenture mentioned: and *Smith* covenanted to pay all taxes, rates &c., and to enter, and dig, and carry away the tin &c. The residue of the term so granted became vested in the appellant.

Within the parish of *St. Austell* are situate two of the manors mentioned in the above lease; namely, the manor of *Treverbryn Courtney*, parcel of the annexed possessions of the Duchy, and the manor of *Tewington*, late parcel of the ancient Duchy of *Cornwall*. Within those manors respectively there are several tin stream works and tin mines, some within parts which are bounded
according

according to the custom of the stannaries (a), and others within other parts which are not bounded. By the custom of the stannaries the right of searching and working for tin is vested in the owner of the tin bounds, he paying to the lord of the manor, or his lessee, the customary toll, which in the manor of *Treverbryn Court-nay* is one fifteenth, and in *Tewington* one tenth part, of the tin gained, free and clear of all risk and deductions. The yearly value derived to the appellant in *Saint Austell* under the above lease is 1516*l.* The principal part of the 1516*l.* is derived from *Buckler's Mine*, situate on *Boscundle Common*, the whole of which is under tin bounds, and is within the manor of *Tewington*. This is a very ancient tin mine, and has been worked by the present adventurers ever since 1831. The remainder of the 1516*l.* is derived from mines from which the appellant receives toll tin from the adventurers in kind.

By indenture of 17th *September* 1835, the appellant demised to *Rundle* and *Tayler*, the adventurers in *Buckler's Mine*, for twenty-one years from the date thereof, the full and free liberty, licence, and authority to enter into and upon all that the land and ground comprized within the limits thereafter mentioned, with full power and liberty to break and open the soil and ground, and to drive any adits and levels and to sink any shafts and to make any erections or buildings for digging and searching for tin and tin ore in the said premises, according to the custom of tin works in *Cornwall*; and also with liberty at their or any of their free wills and pleasure to take and carry away the same, reserving nevertheless to the appellant the liberty from time to time to enter and inspect the workings of the

1840.

THE QUEEN
against
CREASE.

(a) See *Crease v. Barrett*, 1 *Cro. M. & R.* 919.

1840.

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The QUEEN
against
CREASE.

said mine, and to take up any adits for the purpose of working any adjoining mine, and to keep open, repair, and use the same, making reasonable compensation to *Tayler* and *Rundle* for so doing: Yielding, paying, and delivering, during the said term thereby granted to appellant, his executors, administrators and assigns, from time to time, within six weeks after the return or sale of every parcel of tin or tin ore gotten in the said demised premises, the clear sum of 1s. in the pound on the gross value, according to the price of the day, of all tin and tin ore which should from time to time be digged, raised, and gotten out of, from, and in the said premises thereinbefore mentioned, such 1s. to be paid clear and free from all returning charges, poor rates (if any should be payable), and all other rates and deductions whatsoever.

The lease is still existing, and the premises demised, including *Buckler's Mine*, are, and were at the time of making the rate, in the possession and occupation of the said lessees, but they are not rated in respect of them. They have raised considerable quantities of tin, and disposed of and sold them as and to whom they thought fit. Since the date of the lease, the appellant has not received any tin or tin ore in kind from the lessees, but payment in money from *Buckler's Mine* according to the reservation. All the property in *St. Austell's* is assessed according to stat. 6 & 7 W. 4. c. 96. The appellant is not an inhabitant, nor an occupier of any land or property therein, unless he be deemed so under the above circumstances.

If this Court should be of opinion that the appellant was not rateable at all in respect of his toll tin, the rate was to be further amended by striking out his name altogether. If the Court should be of opinion that he

was

was not so rateable in respect of *Buckler's Mine*, the sum of 1400*l.* was to be reduced to 100*l.*, and the sum of 35*l.* to 5*l.* (a). The case was argued last *Michaelmas* term (b).

1840.

—
The QUEEN
against
CREASE.

Erle and *M. Smith* in support of the order of sessions. The appellant will contend in the first place that the toll of tin is not rateable; but this is contrary to the decisions in *Rowls v. Gells* (c), *Rex v. St. Agnes* (d), *Rex v. The Baptist Mill Company* (e), and *Rex v. St. Austell* (g). The principle of those cases is, that, although the toll or duty is derived from mines which are exempt from rate by reason of the risk attending them, yet, being itself a product free from risk, it ought to be rated. The ground of decision in *Rowls v. Gells* (c) is so stated by *Buller J.* in *Rex v. Carlyon* (h). Some cases which may be cited on the other side are not applicable. In *Rex v. The Bishop of Rochester* (i) no ore had been raised. In *Rex v. The Earl of Pomfret* (k) the stipulation in the lease for rendering a portion of the smelted lead was considered to be a reservation of rent, and not an exception of part of the very thing demised; and therefore it was held not rateable. In *Rex v. Welbank* (l) the attempt was to rate in respect of a rent. In *Rex v. Tremayne* (m) the reservation was

(a) The case also suggested, as an objection to the form of the rate, that it did not state the names and situations of the mines, though they had distinct names, were distant from each other, and were worked by different adventurers. The counsel supporting the rate proposed that, if this were held a material defect, the rate should go back to be amended.

(b) November 9th, 1839. Before Lord Denman C. J., *Patteson, Williams, and Coleridge* Js.

(c) 2 *Cowp.* 451.

(d) 3 *T. R.* 480.

(e) 1 *M. & S.* 612.

(g) 5 *B. & Ald.* 693.

(h) 3 *T. R.* 885.

(i) 12 *East*, 353.

(k) 5 *M. & S.* 139.

(l) 4 *M. & S.* 222.

(m) 4 *B. & Ald.* 162.

1840.

The QUEEN
against
CREASE.

of a money rent; no part of the proceeds of the soil was separated to the use of the lessor. Here Mr. *Crease* receives toll tin in kind for a part of the mines; so far, therefore, he is clearly liable, unless the first-cited cases be over-ruled. The second question will be whether *Buckler's Mine* falls under a different rule, by reason of the demise to *Rundle* and *Tayler*. At the time of the demise *Buckler's Mine* was under bounds, and worked by the present adventurers. They were already entitled to the ore, and privileged to get it, yielding to *Crease* a portion of the produce according to the custom. *Crease* could not confer upon them that which they actually had, namely, the easement of opening the soil and mining. He had not that right in himself as grantee under the Duchy; for the demise to him, so far as it affects *Buckler's Mine*, was of the tin toll only. Now as to the toll, the bound owner, according to the custom, was to render a tenth part of the tin in specie to the lord or his lessee; supposing *Crease* to have received not the tin itself, but the value, that would merely have constituted the bound owner his agent to carry the tenth part to market and pay him the produce. Here the transaction is essentially the same; but a colourable demise to *Tayler* and *Rundle* is introduced to convert the payment into a rent, and so protect both the lord's grantee and the adventurers from liability to rate. If the sum thereby reserved were a bona fide rent, the adventurers ought to be rateable as farmers of the tin toll. But the demise does not place them in that situation: the tolls are not made over with reservation of an ascertained sum, but with a stipulation for payments which must vary and be the subject of a continual accounting between *Crease* and

and the lessees. Such payments are not a rent. Supposing that the case could be likened to those in which a composition is made, as in the case of tithes, the party receiving the equivalent in those instances is still occupier for the purpose of rating; *Rex v. Lambeth* (a): *Rex v. Boldero* (b) and *Chanter v. Glubb* (c) are analogous cases. There is a clause in the demise of 1835, charging *Tayler* and *Rundle* with poor-rates if any should be payable; but that cannot be taken notice of as against the rights of the parish. [*Patteson J.* Unless it helped to shew that this was an actual demise of the toll tin in kind. *Coleridge J.* The sessions have found no fraud. It is not uncommon in *Cornwall*, when there is a doubt whether lands are under bound or not, to take a lease both from the party supposed to be bound-owner and from the lord.]

1840.

The QUEEN
against
CREASE.

Sir *W. W. Follett*, *Bere*, and *Butt*, contra. As to the first point, the decisions relied upon have been doubted; and in *Rex v. St. Austell* (d) *Abbott C. J.*, when deciding in favour of the rate, said that he did so with the less reluctance, because the appellant might still commence an action against those who should levy for the rate, and so the question might be brought before a higher tribunal. The question as to the rateability of toll tin is now depending in the Court of Exchequer Chamber; *Crease v. Sawle* (e). [*Lord Denman C. J.* Perhaps the argument on that point had better not be gone into at present.] Then, as to the lease of 1835,

(a) 1 *Str.* 525. *S. C.* 8 *Mod.* 61.(b) 4 *B. & C.* 467.(c) 9 *B. & C.* 479.(d) 5 *B. & Ald.* 693.(e) Depending in error on a judgment in *Q. B.* entered up without argument.

1840.

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The QUEEN
against
CREASE.

the case is not distinguishable from *Rex v. Tremayne* (a), where the appellant, representing the grantor of a licence to dig for manganese in the respondent parish, rendering 1*l.* 15*s.* for every ton raised, was held exempt from rateability, not being entitled to any portion of the soil, but merely to a money payment, and therefore not being an occupier. *Rex v. The Bishop of Rochester* (b) and *Rex v. The Earl of Pomfret* (c) were decided on the same ground, that the lessor is not an occupier where the thing reserved is not part of the product of the soil. The principle, that “no person can be an occupier unless he has the exclusive right to enjoy some portion of the soil,” is stated by Parke J. in *Rex v. The Mersey and Irwell Navigation Company* (d), and was the ground of decision in that case and *Rex v. Thomas* (e). In *Rex v. Lambeth* (g) there was no regular demise of the tithes by the tithe farmer, and therefore he was the only legal occupier. But it appears to have been the opinion of this Court in *Rex v. Wilson* (h), that a lessee

.. (a) 4 B. & Ad. 162.

(b) 12 East, 353.

(c) 5 M. & S. 139.

(d) 9 B. & C. 95. 112.

(e) 9 B. & C. 114.

(g) 1 Stra. 524. S. C. 8 Mod. 61.

(h) 5 Nev. & M. 119. The case does not support the above general proposition. A rule nisi was obtained in *Michaelmas* term, 1834, for a mandamus to two justices of the West Riding of Yorkshire (Mr. Wilson and another) to issue a distress warrant against *James Hamerton Esq.*, for nonpayment of a rate assessed upon him as occupier of the vicarial tithes within the township of *Hellifield*. Mr. Hamerton had appeared before the two justices on summons to answer for the nonpayment; but they dismissed it on being satisfied that he derived no benefit to himself from the occupation. In *Trinity* term (May 29th) 1835, Sir W. W. Follett and Milner shewed cause, and Sir F. Pollock and J. L. Adolphus supported the rule. It appeared that, after some litigation between the vicar of *Long Preston* (in which parish *Hellifield* is) and the inhabitants, respecting the vicarial tithes, it had been agreed that they should pay him a fixed annual sum; and that a principal proprietor of each township should take a lease of the tithes of such township, and pay the township's proportion of rent to the vicar.

Mr.

a lessee of tithes is the rateable occupier. In the present case, the appellant is merely the receiver of a pecuniary payment, and therefore not an occupier. It is argued that the render in question cannot be a rent, because nothing passed by the grant of 1835 for which a rent could, *bonâ fide*, be reserved. But by that grant the appellant, being proprietor of the toll and farm of tin, gave liberty to *Tayler* and *Rundle* to open the mines and carry away all the ore. The mine in question was already under bounds; but it appears from *Doe dem. Earl of Falmouth v. Alderson* (a) that bound owners, merely as such, have no right to the soil comprehended within the tin bounds, but an easement only; the lease of 1835 gave to *Tayler* and *Rundle* the right of taking away a portion of tin ore which, as bounders, they could not have taken away consistently with the grant to the appellant. At all events, after accepting that lease, they must be considered as having acted under it. [*Patterson* J. The case avoids saying so.] There is no character in which *Crease* can be rateable: he is not an inhabitant; and, whatever interest he acquired under the Duchy lease, he has granted it away. Assuming that *Rowls v. Gells* (b) is well decided, and that he might have been rateable for lot and cope, he has conveyed away that profit for a money rent. The lessees may

1840.

The QUEEN
against
CREASE.

Mr. *Hamerton* took such lease of the *Hellifield* tithes, and paid the rent, levying the amount on the tithe-payers in proportions assessed by himself and some of the inhabitants. He held the lease, and acted, as a trustee for the tithe-payers, not receiving or contemplating any benefit to himself. The Court (Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams*, Js.) thought that this circumstance was not material, and that Mr. *Hamerton* was legally the occupier; but they discharged the rule, because the summons had been granted on a promise by one of the overseers to produce evidence of beneficial occupation, which had not been done.

(a) 1 M. & W. 210.; S. C. Tyr. & G. 543. (b) 2 Cowp. 451.

not

1840.

—
The QUEEN
against
CREASE.

not be rateable for it; but that furnishes no argument for the respondents. There are many profits for which no one is rateable. [*Patteson J.* The land being under bounds, *Crease* appears to have been owner of the tin toll only; how do you shew that that was out of him by the demise?] He conveys all the right he had. By the custom as to bounding, the bound owner would pay as toll one tenth of the tin gained. This demise enables the lessees to take that tenth part. [*Coleridge J.* They stand in two situations; as adventurers they are entitled to the nine parts, and as lessees of the toll to the tenth part which accrues due to the lord or his lessee at the moment when the ore is brought to the surface.] It is suggested that the demise was made for the purpose of avoiding rateability; but no fraud is found.

Cur. adv. vult.

Lord DENMAN C. J. in this vacation (*February 4th*), delivered the judgment of the Court. After stating the substance of the case, his Lordship proceeded as follows.

Upon this state of facts, it was contended in argument that (without reference to the lease above set forth) the toll tin is not rateable, and we were called upon again to examine the cases of *Rowls v. Gells* (a), *Rex v. St. Agnes* (b), *Rex v. The Baptist Mill Company* (c), and *Rex v. St. Austell* (d), which, it was admitted, have decided that such property is rateable. Upon this point, which does not, in truth, affect the principal subject now in dispute, as our judgment proceeds upon another ground, we think it unnecessary to say more than that, whilst they remain unreversed by a court of error, we

(a) 2 *Corp.* 451.

(b) 3 *T. R.* 480.

(c) 1 *M. & S.* 612.

(d) 5 *B. & Ald.* 693.

feel ourselves bound by the authority of cases considered and reconsidered so often and so deliberately. The conclusion, therefore, on this point is, that the form of the rate is right, and that, in substance, it is correct at all events to the extent of 5*l*.

With respect to the effect of the lease, which raises the principal point, it was urged in support of the rate that, in truth, nothing passed by it: that the whole transaction was merely colourable, and intended to exempt the property from rateability. When, however, we find it expressly stated that, from the date of the lease, the appellant has received no part of the produce of the mine, but *a money payment only*, and further bear in mind that it is not the province of this Court to presume or infer fraud where none is found by the sessions, we think that this circumstance (the money payment) distinguishes this case from those above referred to, and brings it directly within the principle of *Rex v. The Earl of Pomfret* (a) and *Rex v. Tremayne* (b), which distinction is plainly pointed out by *Le Blanc J.* in *Rex v. The Baptist Mill Company* (c), in the following words: — “Where a person receives, without risk, part of the produce extracted from the bowels of the earth, he is an occupier of land; but where he merely receives a rent, or money payment, he is not an occupier.”

The consequence is, from the form in which the question is submitted to us in the case, that the assessment upon the appellant must be reduced from the sum of 35*l*. to 5*l*.

Rate to be reduced accordingly.

(a) 5 *M. & S.* 139.

(b) 4 *B. & Ad.* 162.

(c) 1 *M. & S.* 612. 619.

1840.

—
The QUEEN
against
CREASE.

1840.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

*Monday,
February 3d.*FLIGHT and Others *against* THOMAS.

Under stat. 2 & 3 W. 4. c. 71., sects. 3 and 4, a party is prescriptively entitled to the access and use of light, if his enjoyment commenced twenty years next before the bringing of an action in which the right is contested, provided such enjoyment has not at any time been interrupted, and the interruption acquiesced in, for a whole year.

The clause of sect. 4, requiring that the interruption, to bar a prescriptive title, shall have been acquiesced in for more than a year, is not limited to obstructions preceded and followed by portions of the twenty years, but applies also to an obstruction ending with that period.

Therefore a prescriptive title to the access and use of light may be gained by an enjoyment for three hundred and thirty days, followed by an obstruction (not acquiesced in) for thirty-five days.

CASE. The first count of the declaration stated that the plaintiff (below), before and at the time of the committing &c., was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage or house with the appurtenances, situate &c., in which said messuage or house, during all the time aforesaid, there were, and still of right ought to be, divers, viz. three, windows through which the light and air, during all the time aforesaid, ought to have entered, and, until the committing &c., did enter, and still of right ought to enter, into the said messuage or house, for the convenient and wholesome use, occupation, and enjoyment thereof: yet defendants (below), well knowing &c., but contriving &c. to injure plaintiff, and to deprive him of the use, benefit, and enjoyment of a certain one of the said windows, and to annoy and inconvenience him in the use, possession, and enjoyment of the said messuage or house with the appurtenances, heretofore, viz. on 1st *January*, A.D. 1832, wrongfully and injuriously erected and raised, and caused and procured to be erected and raised, a certain wall and building near to the last mentioned of the said windows; and afterwards, viz. on 1st *February* in the year afore-

said,

said, wrongfully and injuriously erected and raised, and caused &c., a certain other wall and building near to the said last mentioned of the said windows; and wrongfully and injuriously kept and continued the said walls and buildings so there respectively wrongfully erected and raised for a long time, viz. from the respective times of raising and erecting the same until the time of the commencement of this suit: by means of which said premises the said messuage or house, during all the time aforesaid, was and is greatly darkened, and the light and air were and are hindered &c.

First plea to the first count, except as to the parts mentioned in the introductory part of the second plea, Not Guilty. Second plea to the first count, as to erecting part of the first wall mentioned, and thereby preventing light and air from entering through part, viz. the middle part, of the said window, near to which &c., actionem non, because defendants say that, at the time of their erecting, and causing &c., the said part of the said wall and building, the said part of the said window in this plea mentioned had been made, and had existed and been enjoyed, and the access and use of light and air through and by means of the said part of the same window and the opening and space thereof had been enjoyed, for a certain short space of time only, and for a less period than twenty years, that is to say, for nineteen years and a part of another year, only: and that the said part of the said wall &c., in this plea mentioned, was kept and continued from the said time of the raising and erecting thereof continually until the commencement of this suit and hitherto; and that the space or period of one year did not elapse from the said time of the raising and

1840.

FLIGHT
against
THOMAS.

1840.

 FLIGHT
 against
 THOMAS.

and erecting of the said part of the said wall &c. before or until the commencement of this suit : and that, at the time of the erecting and raising of the said part of the said wall &c., viz. on 1st *January*, A.D. 1832, and from the time of such last mentioned erecting and raising continually until the commencement of this suit, plaintiff had notice that defendants had erected and raised the said part of the said wall, and thereby prevented the light and air from entering into the said house through the said part of the said window : and that, at the time of the said erecting and raising and causing to be &c. the said part of the said wall, in manner &c., and continually from thenceforth until the commencement of this suit, the light and air ought not to have entered through the said part of the said window into the said house for the convenient or wholesome use, occupation or enjoyment thereof, save for and by reason and means of the premises in this plea in that behalf aforesaid; without this, that the light and air ought to have entered through the said part of the said window in this plea mentioned, in manner &c. Conclusion to the country. Issue thereon. There were other pleadings, which it is unnecessary to state.

The cause was tried before *Parke B.*, at the *Dorchester* Summer assizes, 1838, and a bill of exceptions tendered, on grounds which were stated in the bill (substantially) as follows.

It was proved that, at the time of defendants erecting &c. the part of the wall mentioned in the second plea, the part of the window therein also mentioned had been made, and had existed and been enjoyed, and the access and use of the light and air, through and by means of the same window and the opening and space thereof, had

had been enjoyed, for nineteen years and three hundred and thirty days only; and that the space of one year did not elapse from the time of the erecting &c. the said part of the said wall before or until the commencement of this suit, such suit being the only suit or action wherein the right or claim to the access or use of light or air through or by means of the same window and the opening and space thereof has been brought into question: and that, at the time of the erecting &c. of the said part of the same wall, and from the time of such last mentioned erecting &c. continually until the commencement of this suit, plaintiff had notice that the defendants had erected &c. the said part of the same wall, and had thereby prevented the light and air from entering into the house in the declaration mentioned through the said part of the same window. And it was further proved that, at the time of the commencement of this suit, the said part of the same window had been made, and had existed and been enjoyed, and the access and use of light and air, through the said part &c. and the opening and space thereof, had been enjoyed, for the full space of twenty years, save and except as aforesaid, without any interruption, save and except the interruption above mentioned; and that the same was not enjoyed by any consent or agreement expressly made or given for that purpose by deed or writing; and that at the time of the commencement of this suit such interruption had not been submitted to or acquiesced in for one year after plaintiff had notice thereof, nor had the said interruption existed for one year before the commencement of this suit. Whereupon plaintiff's counsel insisted that the matters so proved were decisive evidence that the light and air ought to have entered

1840.

FLIGHT
against
THOMAS.

1840.

 FLIGHT
 against
 THOMAS.

entered &c., in manner &c.; and they alleged that plaintiff was therefore entitled to the verdict. Defendants' counsel insisted that the matters proved were decisive to the contrary, and entitled defendants to a verdict. The bill of exceptions then stated that the Judge gave his opinion in favour of the plaintiff, and directed the jury accordingly: and a verdict was found for the plaintiff: whereupon defendants' counsel excepted &c.

Judgment having been entered up, the defendants below brought error. The assignment of errors was in the common form; and the bill of exceptions was stated in the writ, and produced by the plaintiffs in error. The case was argued at the sittings in error in *Trinity* vacation, 1839, before *Tindal C. J.*, *Vaughan*, *Bosanquet*, and *Erskine Js.*, and *Parke*, *Gurney*, and *Maule Bs.*

Manning for the plaintiffs in error (the defendants below). The plaintiff below asserts a right existing at the time when the grievances were committed. If the right was only inchoate then, but became complete by subsequent lapse of time, the declaration should have been framed accordingly. It is true that in this case the act complained of had not been acquiesced in for a year when the action was brought; but the right had not been enjoyed for the full period of twenty years next before action brought: it had been broken off before the expiration of the twenty years, and continued so down to the commencement of the action. In such a case the enactment requiring that the interruption shall have continued a year does not take effect. *Bright v. Walker (a)* shews the principle upon which sects. 3

(a) 1 Cro. M. & R. 211. S. C. 4 Tyr. 502.

and

and 4 of stat. 2 & 3 *W. 4. c. 71. (a)* must be construed and applied. [*Parke B.* My opinion at nisi prius was founded on the wording of the clauses; I should have been glad if the absurdity arising upon them could have been got rid of. The enacting clause, sect. 3, gives an indefeasible title if the easement shall have been "actually enjoyed" for the full period of twenty years without interruption. The explaining clause, sect. 4, declares that no act shall be deemed an interruption, unless the same shall have been acquiesced in for one year after notice. Thus, if there be any series of interruptions, each for less than a year, the enjoyment will suffice, however it may fall short of twenty years, and although it be taken against the will of the owner, who endeavours to interrupt it. The more reasonable provision would have been that any interruption, acquiesced in, should suffice, as that would conclusively rebut the supposition of a grant. But the difficulty here is, to get over the words.] According to the construction on the other side, if the wall had been built in the twentieth year, and the owner of the window had thrown it down,

(a) Stat. 2 & 3 *W. 4. c. 71. s. 3.* enacts, "That when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Sect. 4 enacts, "That each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made."

1840.

 FLIGHT
 against
 THOMAS.

1840.

 FLIGHT
 against
 THOMAS.

the builder might have recovered against him in trespass during the year; yet, when that period expired, the owner of the window might have brought his action against the builder of the wall for wrongfully erecting it. It cannot have been the intention of the statute that an act, lawful when done, should become unlawful by relation. "Acts of parliament are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged;" *Co. Litt.* 360 *a*. "The words of an act of parliament must be taken in a lawful and rightful sense;" *Co. Litt.* 381 *b*. Statutes must be subjected to those exceptions which reason requires, though not made in words; *Reniger v. Fogossa* (*a*). "That, which law and reason allows, shall be taken to be in force against the words of statutes;" *Partridge v. Strange* (*b*). The Judges have sometimes taken things by equity against the text, to reconcile them with reason; *Fulmerston v. Steward* (*c*); and have limited general words according to the exigence of particular cases and the real intent of the legislators; *Stradling v. Morgan* (*d*). Similar doctrine is laid down in *Willion v. Barkley* (*e*), *Stowell v. Lord Zouch* (*g*), and *Eyston v. Studd* (*h*). In some of the passages referred to, instances are given in which, to avoid practical absurdity, more violence has been done to the words of statutes than the plaintiffs in error contend for here. *Maltravers v. Powel* (*i*), *Harbert's Case* (*k*), and 2 *Inst.* 292, 293, also furnish authorities for a reasonable, as distinguished from a literal,

(a) *Plowd.* 1. 13.(c) *Plowd.* 102. 109.(e) *Plowd.* 223. 231.(h) *Plowd.* 459. 464.(k) 3 *Rep.* 11 b. 13 b.(b) *Plowd.* 77. 88.(d) *Plowd.* 199. 204, 205.(g) *Plowd.* 353. 366.(i) *Dyer*, 245 a. pl. 64.

construction

construction of statutes: and in 2 *Inst.* 112. it is said that they "must be so construed, as no collateral prejudice grow thereby." The words *enjoyment as of right* in stat. 2 & 3 *W. 4. c. 71. s. 5.* are commented upon by this Court in *Tickle v. Brown (a)*; and it is there laid down that the enjoyment required by the statute must have been either strictly legal, or, if not so, "yet lawful to the extent of excusing a trespass." Here, if the plaintiff had thrown down the wall within the twenty years, and had been sued in trespass, his prior enjoyment would not have been a sufficient excuse. [*Parke B.* The words "excusing a trespass," there, mean that the thing shall be done under a claim of right, and not by stealth.] The Court say that an enjoyment had "by tacit sufferance" will not suffice; and that seems

be the present case. The user ought to be accompanied by an assertion of right. [*Maule B.* Sect. 2 requires that the easements there mentioned shall have been enjoyed by persons "claiming right thereto;" but in sect. 3, which relates to the access of light, there is no such expression; and I think the omission is made purposely.] Sect. 5 requires the enjoyment "as of right" to be pleaded in all the cases where an immemorial right was formerly alleged. [*Maule B.* The clause referred to seems applicable only where a defendant claims to do that which, but for his right under the act, would be a trespass. It is questionable whether the forms given there apply to windows.] *Wright v. Williams (b)* may be cited, where it was laid down that the statute "intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalize every act done in the exercise

1840.

 FLIGHT
against
THOMAS.
(a) 4 *A. & E.* 369.(b) 1 *M. & W.* 77. *S. C. Tyr. & G.* 375.

1840.

FLIGHT
against
THOMAS.

of the right during their continuance." But there the defendants, who relied upon the statute, had, for forty years, done acts on which they grounded their right, namely, the collecting of foul water and discharging it over the plaintiff's closes; here there was no act which the plaintiff below could have done to bring into controversy the right of maintaining the wall, but to abate it. The cases, therefore, are very different.

Erle, contra. The direct words of the statute are in favour of the plaintiff below. The Court must look back to the period of twenty years before action brought, and see whether the claimant has enjoyed, during the intermediate time, without any interruption acquiesced in for a year after notice. Undoubtedly the consequence is that an inchoate right is acquired immediately after the expiration of nineteen years, which right will be complete if not disputed by action within the twenty years. There is no hardship in this; for the party against whom the right is being acquired has notice that the servitude is about to be imposed; but at any rate the Court will not speculate on comparative inconveniences where the letter of the statute is clear. If the words "without interruption" in sect. 3 be not qualified by sect. 4, it must follow that an interruption for any period, not only at the end of the twentieth year, but at any time after the commencement of the twenty years, will defeat the right. But the sense of the statute is, that, if the enjoyment has continued for more than nineteen years, and is then interrupted until the end of the twentieth, the right becomes perfect notwithstanding such interruption; and, if the interruption be continued, an action
lies

lies for the continuance. [*Maule B.* Supposing "interruption," in sect. 3, to mean an interval between two periods of enjoyment, the difficulty would be removed, and the case decided against you. *Tindal C. J.* The question is, whether nineteen years and a day can give right under sect. 3.] It will, after the twenty years have expired. [*Bosanquet J.* Suppose there had been an enjoyment for twenty years without interruption, and then an interruption submitted to for a year before action brought: do you say the right would be gone?] It would not, having once been perfected. [*Bosanquet J.* referred to sect. 6. *Parke B.* That seems to contemplate the case in which there is no proof except by inference from a lapse of years (*a*).] In this case the only interruption has been for a shorter period than a year, and there is no authority for ascribing any greater effect to such an imperfect interruption at the end than in the middle of the year. [*Tindal C. J.* The argument is, that it prevents the twenty years from being completed.] The same might have been said here if the wall had been built in the middle of the year and immediately thrown down. Bringing an action is equivalent, for this purpose, to abating the wall. The judgment delivered by Lord *Abinger C. B.* in *Wright v. Williams* (*b*) is decisive of the present case, and was concurred in, so far as it applies here, by the Court of Common Pleas in *Jones v. Price* (*c*), and, more expressly, by the Court of Queen's Bench in *Richards v. Fry* (*d*). [*Parke B.* It results from the decision in *Wright v. Williams* (*b*) that, if there be an enjoyment

1840.

 FLIGHT
 against
 THOMAS.

(a) See the judgment of *Coleridge J.* in *Bailey v. Appleyard*, 8 *A. & E.* 161.

(b) 1 *M. & W.* 77. *S. C. Tyr. & G.* 375. (c) 3 *New Ca.* 52.

(d) 7 *A. & E.* 698.

1840.

 FLIGHT
 against
 THOMAS.

for twenty years, with an interruption for two days during one of those years, an action for such interruption may be brought when the twenty years expire, because the lapse of that period of enjoyment would shew a right from its first commencement. But the question now is, whether such an interrupted enjoyment will suffice under the third section.] Here has been an obstruction for thirty-five days ending with the twenty years: an action may be brought for the obstruction caused on any one of those days; and it is not necessary that there should have been a subsequent enjoyment. And the declaration is large enough in its averments to meet the state of facts. *Rex v. Calow* (a) was decided on the principle that a party's "subsequent possession reflects light back on the title under which he before held." It appears from *Payne v. Shedden* (b) that a mere cessation of user during part of the twenty years is not necessarily inconsistent with continued enjoyment. It may be said that the construction now insisted upon shortens the period of prescription from twenty years to nineteen and a day; but no argument can be founded on that consequence. In like manner it might be said, though inaccurately, that the decision in *Doe dem. Knight v. Nepean* (c) shortened the time for bringing ejectment in similar cases to thirteen years. [Erskine J. The title here does not become complete at the shorter period; but only the evidence of title.]

(a) 3 M. & S. 22.

(b) 1 M. & Rob. 382.

(c) 5 B. & Ad. 86. Judgment affirmed on error (as to the point here referred to), *Nepean v. Doe dem. Knight*, 2 M. & W. 894.

Manning, in reply. *Richards v. Fry* (a) shews only that a party setting up title under the statute must follow its language in pleading. Stat. 2 & 3 W. 4. c. 71. s. 3. requires that the access of light shall have been enjoyed "for the full period of twenty years without interruption." Assuming that this might be construed in some cases to mean "with interruption," still the language implies that there must be a subsequent as well as a prior enjoyment. [*Parke* B. Sect. 4 speaks of the *party* interrupted. The statute seems to contemplate interruption of the right, not of the period.] Sects. 3 & 4 must be taken together. Suppose the words of sect. 3 had been "with interruption, but not acquiesced in for one year:" could it be doubted that an enjoyment after as well as before was contemplated? The case has been put, on the other side, as if the action were entirely for a wrongful continuance; but the declaration is not so framed. *Wright v. Williams* (b) may require some revision, if it decides that an act, lawful when done, may become unlawful by relation.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court. After stating the substance of the first count of the declaration, and of the second plea, and the facts proved before *Parke* B., with his ruling, and the exception, as stated, pp. 688—692, *antè*, his lordship continued as follows.

The question, therefore, before us arises entirely on the statute 2 & 3 W. 4. c. 71. "for shortening the time of prescription in certain cases," and will depend prin-

(a) 7 A. & E. 698.

(b) 1 M. & W. 77. S. C. Tyr. & G. 875.

1840.

FLIGHT
against
THOMAS.

1840.

FLIGHT
against
THOMAS.

cipally on the construction to be put on the third and fourth sections of that act. If the third section had stood alone, the plaintiff below could not have established any claim to the use of the light in question; for the use of the light had not, upon the evidence, been actually enjoyed with the messuage for the full period of twenty years next before the commencement of the action *without interruption*, inasmuch as the defendants below, when the use had been actually enjoyed for nineteen years and three hundred and thirty days, first interrupted the enjoyment by the erection of the building, which interruption continued down to the commencement of the suit. But the fourth section proceeds to define by legislative enactment what is intended by the word "interruption" used in the third section: viz., "that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same." And, as, upon the trial, it was proved that the erection of the wall, which was in this case the act or matter complained of, was not submitted to or acquiesced in by the plaintiff below for one year after he had notice of it, but for a very small portion of a year only, inasmuch as within a few months from the time of erecting the wall the plaintiff below brought his action, we think such erection of the wall, and continuing it so erected, cannot, according to the express words of the fourth section, be deemed an interruption within the meaning of the act.

This must be the unavoidable conclusion from the premises, unless it is to be held that the word "interruption"

ruption" is to be confined to the case of intermediate obstructions or hindrances in the course of the period of enjoyment of twenty years mentioned in the statute; and that it is incapable of comprehending or being applied to the case of an obstruction or hindrance at the latter part of the period of twenty years, so as to prevent the actual enjoyment "for the full period of twenty years without interruption" from taking place. But there is nothing in the word itself which necessarily confines its meaning to an obstruction in the middle or course of the enjoyment; and no authority has been cited to shew that an interruption for the last three months of the period of twenty years is to be considered as different in itself, or in its legal consequences, from an interruption of the same duration in the middle of the twenty years. Indeed the fourth section uses the expression of the "party interrupted;" which may well denote that the interruption is an obstruction to the exercise of the right, and not necessarily an interruption of the period. It must undoubtedly be admitted that there are difficulties attending the act whichever way it be construed. If construed in favour of the plaintiff below, it follows that an enjoyment for nineteen years and a fraction will establish the right, provided the action be brought before the interruption has continued for the full period of a year. If decided in favour of the defendants below, then we must hold an obstruction for less than a year to be an interruption. Upon the whole, we adhere best to the established rule for the interpretation of acts of the legislature, that, where it is possible, full sense and meaning must be given to every clause of the act, when we hold that the obstruction in this case was no interruption within

1840.

FLIGHT
against
THOMAS.

1840.

FLIGHT
against
THOMAS.

within the meaning of the act, and, consequently, that the actual enjoyment of the use of the light continued for the full period of twenty years without interruption, and that the direction of the learned Baron was right.

We therefore think the judgment of the court below must be affirmed.

Judgment affirmed (a).

(a) This judgment was affirmed by the House of Lords, on error, June 14th, 1841. See *Parker v. Mitchell*, p. 788, post.

Monday,
February 3d.

HATCH against TRAYES.

WATSON against KIGHTLEY.

Debt may be maintained on a promissory note, by payee against maker, though the instrument do not express that it is for value received, or for any consideration.

So on a bill of exchange, by drawer, being also payee, against acceptor.

THESE were actions of debt.

In *Hatch v. Traves* the declaration charged that defendant, on 8th *April* 1837, made her promissory note in writing, and delivered the same to plaintiff, and thereby agreed to pay to plaintiff or his order the sum of &c. (44*l.* by instalments, 4*l.* to be paid on 30th *April* 1837, and the rest quarterly, by payments of 10*l.*, commencing on that day (a)); by means whereof defendant then, towit on 8th *April* 1837, became liable to pay plaintiff the sum of 44*l.* in the note specified, according to the tenor and effect thereof: whereby, and by reason of the nonpayment thereof, and of the same still remaining unpaid, an action has accrued to plaintiff to demand and have from defendant the sum of 44*l.* in the note specified, parcel &c.

General demurrer, and joinder. The cause assigned

(a) The writ issued on 27th *September* 1838.

in

in the margin was that the instrument declared on was not expressed to be for value received; that debt did not lie on a promissory note not expressed to be for value received; and that the instrument declared on was not a promissory note.

In *Watson v. Kightley* the declaration charged that plaintiff, on 10th *January* 1839, made his bill of exchange in writing, and directed the same to defendant, and thereby required defendant to pay to plaintiff or his order 7*l.* 8*s.* 10*d.*, one month after date, which period had elapsed before the commencement of the suit; and defendant then and there accepted the bill, and delivered the same to plaintiff, and then and there agreed to pay plaintiff the amount of the bill, according to the tenor and effect thereof, and of the said acceptance thereon.

Special demurrer, assigning for cause that it did not appear by the count that the bill of exchange was accepted for value received; and that an action of debt was not sustainable by the drawer or payee of a bill of exchange against the acceptor, unless such bill on the face thereof expressed that the same was accepted for value received, or some consideration; and that it was not shewn in the count that there was any value or consideration for the acceptance. Joinder in demurrer.

Both cases were argued on the same day (a) in last term; *Hatch v. Traves* by *W. H. Watson* for the defendant, and *Butt* for the plaintiff, and *Watson v. Kightley* by *Bramwell* for the defendant, and *Whitehurst* for the plaintiff.

Arguments for the defendants. Debt cannot be main-

(a) *January* 24th, 1840. Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

1840.

HATCH
against
TRAVES.

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1840.

HATCH
against
TRAYES.

tained by the payee of a promissory note against the maker, nor by the drawer of a bill of exchange against the acceptor, unless the instrument be expressed to be for value received. The instances in which debt lies upon contract are enumerated in *Com. Dig. Debt*, (A 8.); and the present cases are not included : and, under the same title, (B), cases are stated in which debt does not lie, among which are these : “debt does not lie upon a bill of exchange against the acceptor; for the acceptance binds him by the custom of merchants, but does not raise a duty;” for which an *Anonymous Case* (a) in *Hardres* is cited ; and, again, “ It does not lie upon a note to pay, without a consideration ; tho’ alleged that it binds by custom ;” for which *Pearson v. Garret* (b) is cited. A naked contract to pay money will not raise a debt : and acceptances are notoriously often given where no debt has previously existed between the parties, for accommodation, or for the debt of a third person. In *Priddy v. Henbrey* (c) it was held that the drawer of a bill might maintain debt against the acceptor where the bill was expressed to be “for value received in goods:” but there the Court carefully confined the decision to the particular case where such words appeared, understanding them to import consideration between the parties, and recognising the authority of the *Anonymous Case* (a) in *Hardres*. The remarks made by the Court on *Browne v. London* (d) shew that the absence of any expression in the bill imputing consideration would have changed their view altogether. In *Bishop v. Young* (e) it was decided that debt may be maintained by the payee

(a) *Hardr.* 485. Cited as *Milton’s Case*, in *Browne v. London*, 1 *Mod.* 285. See *Brown v. London*, 1 *Ventr.* 152. 4th ed.

(b) *Skin.* 398.

(d) 1 *Mod.* 285.

(c) 1 *B. & C.* 674.

(e) 2 *B. & P.* 78.

of a promissory note against the maker, if the note purport to be for value received. There Lord *Eldon* observed that the expressions above cited from *Comyns* were accurate; and the same remarks apply to that case as to *Priddy v. Henbrey (a)*. And those made by Lord *Eldon (b)* on the statement, in the *Modern Reports*, of *Welsh v. Craig (c)*, support the distinction for which the defendant now contends. The action of debt is peculiar; before stat. 3 & 4 *W. 4. c. 42. s. 13.* it could not be maintained against an executor on the simple contract of his testator, because the testator might have waged his law (*d*), except in the Exchequer, where no wager of law was allowed; nor upon a concessit solvere, except by the custom of *London*, against an executor (*e*), for the same reason. Nor does it lie upon a debt payable by instalments, till all be due (*g*). This last principle was applied to a promissory note payable by instalments, in *Rudder v. Price (h)*, where the payee sued the maker in debt, and the action was held not to lie. In *Randall v. Rigby (i)* one of two joint feoffees covenanted that rent should be paid to the plaintiff: and it was held that such covenantor could not be sued in debt for the arrears of the rent. [*Coleridge J.* In *Compton v. Taylor (k)* the drawer and payee of a bill of exchange declared against the acceptor in the form given by *Reg. Gen. Tr. 1 W. 4. (l)*, and joined counts in debt upon simple contract; and it was held to be no

(a) 1 *B. & C.* 674.(b) 2 *B. & P.* 82.(c) 8 *Mod.* 373. *S. C.* 2 *Stra.* 680.(d) *Pinchon's Case*, 9 *Rep.* 86 b. 87 b.(e) *Snelling's Case*, 5 *Rep.* 82 b. Note (2) to *Turbill's Case*, 1 *Wms. Saund.* 68.(g) *Countess of Plymouth v. Throgmorton*, 1 *Salk.* 65.(h) 1 *H. Bl.* 547.(i) 4 *M. & W.* 130.(k) 4 *M. & W.* 138.(l) 2 *B. & Ad.* 784.

misjoinder.

1840.

HATCH
against
TRAYLOR

1840.

HATCH
against
TRAYES.



misjoinder. Now the form does not contain the words "value received;" and it was pointed out, from the Bench, that the forms were the same for debt and assumpsit.] The question there discussed seems to have been only whether the word "promised" was incompatible with debt. The decision was that there was not necessarily a misjoinder: whether debt would lie at all was not discussed. The demurrer, being to the whole declaration, was too large to raise that. In *Cresswell v. Crisp* (a) and *Lyons v. Cohen* (b) it was decided that such a demurrer as the present was not frivolous. *Comyns* appears to have taken for granted that the remedy was always in assumpsit; *Merchant* (F 12.), (F 13.); *Action upon the Case upon Assumpsit*, (A 2.).

Arguments for the plaintiffs. The absence or insertion of the words "value received" can make no difference: they are implied both in promissory notes and in bills of exchange. It was, indeed, supposed at one time that even assumpsit could not be maintained unless these words were introduced: that, however, is now clearly understood to have been a mistake; *Bayley on Bills*, p. 40. (5th ed.) (c); and the principle applies equally to actions of debt. In *Stratton v. Hill* (d) it was holden that the indorsee of a bill of exchange might sue the indorser in debt. [*W. H. Watson*. That case is explained in the judgment in *Priddy v. Henbrey* (e); it depended upon the particular relation of indorser to indorsee, which creates a privity.] The indorser only contracts to pay if the acceptor do not. [Lord Denman C.J. That was for value received; and the

(a) 2 C. & M. 634.

(b) 3 Dowl. P. C. 243.

(c) *Chitty on Bills*, 160, 161. 9th ed.

(d) 3 Price, 253.

(e) 1 B. & C. 681.

indorser

indorser was also drawer.] But the question was between him and the indorsee. In *Com. Dig. Debt*, (A 8.), it is said, "debt lies upon every express contract to pay a sum certain: as, if a man covenants or grants to pay." A covenant, indeed, implies a consideration; but so does a promissory note between maker and payee, and a bill of exchange between drawer and acceptor (a). In *Rumball v. Ball* (b) debt was brought on a promissory note, containing the words "I acknowledge myself indebted;" and it was held to lie: there the words inserted import no more than is in effect expressed whenever a bill is accepted or a promissory note made. If a declaration omitted the words "value received," and the bill contained them, could that be considered a variance? *Rudder v. Price* (c) is rather in favour of the plaintiffs; for there the decision did not turn upon any general objection to the action of debt upon such instruments, but upon the instalments not being all due. Notes under the Coal Act, 3 G. 2. c. 26. ss. 7, 8. (d), required the consideration to be expressed; but that was by positive enactment. The objection, that the bill may be for the debt of a third party, or merely for accommodation, would apply equally if the words "value received" were inserted; for these words merely import that some consideration, however originating, is now acknowledged to exist as between the drawer and acceptor. *Randall v. Rigby* (e) was decided on the ground that the covenant, on the face of the instrument, was merely collateral. *Compton v. Taylor* (g) shews that the forms given in the rules of

1840.

HATCH
against
TRAYES.

(a) See the judgment of Eyre C. B. in *Gibson v. Minet*, 1 H. Bl. 569. 602.

(b) 10 Mod. 38.

(c) 1 H. Bl. 547.

(d) See *Bayley on Bills*, p. 40. (5th ed.) The clauses are repealed by stat. 47 G. 3. sess. 2. c. lxviii. (local and personal, public). s. 28.

(e) 4 M. & W. 130.

(g) 4 M. & W. 138.

Tr.

1840.

HATCH
against
TRAYLOR.

Tr. 1 W. 4. (a) are applicable to actions of debt, without the words "value received." There *Cloves v. Williams (b)* was cited, where, on demurrer to the plea, the Court considered that a count on a bill of exchange, by indorsee against acceptor, was framed in debt, though it contained the word "promised," and the plaintiff on this objection to the declaration agreed to amend. That was not between the same parties as here: and a question of misjoinder arose. If this action be maintainable upon principle, the Court will sustain it, though there be no direct authority; as was done in the instances of actions of indebitatus assumpsit against a corporation for goods sold and delivered, and of assumpsit on a special contract, not under seal, at the suit of a corporation: *Beverley v. The Lincoln Gas Light and Coke Company (c)*; *Church v. The Imperial Gas Light and Coke Company (d)*.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

The first of these actions was debt by the payee of a promissory note against the maker. The second was debt by the drawer of a bill of exchange against the acceptor. Neither instrument contained the words "value received."

The question, and the course of argument, were substantially the same in the two cases; and the counsel, who contended that the actions were not maintainable for want of the words "value received," admitted that,

(a) 2 B. & Ad. 784.

(b) 5 Scott, 68. S. C. 3 New Ca. 868.

(c) 6 A. & E. 839.

(d) 6 A. & E. 846.

if those words had been inserted, the plaintiff in each case must have succeeded.

But we are of opinion that those words express only what the law must imply, in each case, from the nature of the instrument and the relation of the parties apparent upon it; and that it therefore makes no difference, as to this question, whether the words be or be not inserted.

We hold, therefore, that the action of debt is maintainable in each case; and our view is in accordance with a late decision in the Court of Exchequer, mentioned to us by my Brother *Parke* (a).

Judgment for plaintiff in each case.

(a) Probably *Jones v. Jones*, 6 M. & W. 84. And see *Watkins v. Wake*, 7 M. & W. 488.

1840.

HATCH
against
TRAYES.

1846.

Monday,
February 3d.

DAVIS *against* HOLDING.

Under stat.
6 G. 4. c. 16.
s. 8., which
enacts that a
petitioning cre-
ditor illegally
compounding
with the bank-
rupt shall
forfeit his debt,
such forfeiture
takes effect for
the benefit of
the creditors
under the com-
mission, and
cannot be en-
forced if there
is no longer a
commission
subsisting.

Bills of ex-
change given
to the petition-
ing creditor, by
way of such il-
legal composi-
tion, cannot be
enforced by
him; but, if,
since the agree-
ment was ex-
ecuted, no
further pro-
ceedings have been taken in the bankruptcy, he may sue the bankrupt on the original consideration.

ASSUMPSIT for goods sold and delivered, and on an account stated.

Plea, as to 90*l.* 11*s.*, parcel &c., that, after the supposed causes of action accrued, and before the making the unlawful agreement after mentioned, viz. on &c., defendant, then being a trader within the true intent &c., had become and then was indebted to plaintiff in 100*l.* and upwards for a just debt then due to plaintiff, and defendant was then also indebted to divers other persons in divers other large sums of money; and, defendant being so indebted as aforesaid, and such trader as aforesaid, and the said debts being then due and unpaid and unsatisfied, defendant then became and was a bankrupt within the true intent &c.; and thereupon afterwards, viz. on &c., a certain fiat bearing date &c., grounded upon the statutes &c., on the petition of plaintiff, was duly awarded and issued by the Right Honourable the Lords Commissioners &c. against de-

In pleading such illegal composition to an action on the original debt, it must be shown that the original fiat was proceeded with, or a new one issued, after the composition.

The illegal composition is not pleaded with sufficient certainty by alleging that defendant, being indebted to plaintiff and others, became bankrupt; that a fiat issued on plaintiff's petition; that, the fiat being in force, and defendant still indebted to plaintiff and the said others, and before defendant was adjudged a bankrupt, it was, contrary to the statutes, agreed between plaintiff and defendant, without the consent of the said other creditors, that plaintiff should abandon the fiat, and defendant, in consideration thereof, should pay him a sum reducing his debt to 90*l.*, and give him bills for the residue; and that, in pursuance of such agreement, defendant did afterwards, viz. on &c., pay plaintiff the sum &c., and give him bills for the residue, which plaintiff received in satisfaction of such residue.

Quære, whether such illegal composition be sufficiently shewn by stating that the agreement was to be executed in order that, and whereby, plaintiff might receive more in the pound than the other creditors; that when it was executed the fiat remained in force, and defendant continued indebted to plaintiff and the said other creditors; and that plaintiff received the payment and securities in satisfaction &c., and whereby he might receive more in the pound on his debt than the said other creditors.

pendant

fendant, plaintiff having before then made such affidavit and given such bond as by law in that case was and is required, by which said fiat the said Lords Commissioners authorized plaintiff to prosecute his said petition in his Majesty's Court of Bankruptcy in that behalf. That, the said fiat being in full force, and defendant continuing so indebted to plaintiff and the said other persons, afterwards, and before defendant had been adjudged to be a bankrupt within the true intent &c. under the said fiat, and before defendant had obtained any certificate of conformity to the said fiat, viz. on &c., it was wrongfully, and against the form of the said statutes and laws then in force concerning bankrupts, agreed by and between plaintiff and defendant, without the concurrence or consent of the said other creditors of defendant, that plaintiff should not further prosecute or put in force, or cause to be prosecuted or put in force, the said fiat, and that he should abandon the same and all further prosecution of and proceedings under the same; and that, in consideration thereof, defendant should pay to plaintiff a certain sum of money in part satisfaction of his said debt, whereby the sum of 90*l.* 11*s.* would remain due and owing from defendant to plaintiff thereupon; and, for and in satisfaction of the said 90*l.* 11*s.*, the residue of the said debt so due to plaintiff as aforesaid, defendant should accept a certain bill of exchange, bearing date &c., drawn by plaintiff upon defendant for the payment of 45*l.* 5*s.* 6*d.* four months after the date thereof, and a certain other bill &c., and deliver the same to plaintiff in satisfaction of the residue of the said debt [in order that, and whereby, plaintiff might receive more in the pound in respect of his debt than the said other creditors of defendant]. That,

1840.

DAVIS
against
HOLDING.

1840.

 DAVIS
 against
 HOLDING.

in pursuance of the said agreement, and in performance and fulfilment thereof, defendant did afterwards, [and whilst the said fiat remained in full force, and whilst defendant continued so indebted to plaintiff and the said other persons as aforesaid,] viz. on &c., make such payment to plaintiff as aforesaid, and accept the said several bills of exchange, and deliver the same so accepted to plaintiff, and plaintiff then received the same from defendant in satisfaction for the sum of 90*£* 11*s.*, residue of the said debt as aforesaid, [and whereby the said plaintiff might receive more in the pound in respect of his said debt than the said other creditors of defendant,] whereby, and by force of the statute in such case &c. (a), plaintiff, so receiving the said money and the said bills of exchange in satisfaction of the said debt, hath forfeited his said debt. Averment, that plaintiff hath brought his said action for and in respect of the same identical debt and cause of action for and in re-

(a) Stat. 6 G. 4. c. 16. s. 8., " And be it enacted, That if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction or security shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt."

spect

spect of which, and in satisfaction whereof, the said bills of exchange were so accepted by defendant and delivered to plaintiff as aforesaid. Verification.

1840.

DAVIS
against
HOLDING.

The plea was at first pleaded without the clauses here inserted between brackets, and was specially demurred to on the ground, among others, that it did not appear by the plea that plaintiff, under the agreement, did receive, or might have received, more in the pound in respect of his debt in the last plea mentioned than the other creditors; and also that it did not appear that the fiat was declared valid, and directed to be proceeded with, or was proceeded with, or a new fiat issued. Joinder. This demurrer came on for argument in *Michaelmas* vacation (*November* 30th), 1838.

J. L. Adolphus for the plaintiff. First, the plea does not shew that under the alleged agreement the plaintiff was intended to receive, or did in fact receive, more in the pound than any other creditor. Nor is it shewn that, when the agreement was carried into execution, the defendant even had any other creditor. As far as can be collected from the plea, all the rest may have been satisfied before the defendant paid the sum of money and gave the bills. It is true that, in another cause between these parties, *Davis v. Holding* (a), the Court of Exchequer gave judgment for the defendant on demurrer to a similar plea; but there the attention of the Court does not appear to have been directed to this objection. (He was then stopped by the Court.)

(a) 1 M. & W. 159. S. C. Tyr. & G. 371.

1840.

DAVIS
against
HOLDING.

Sir *F. Pollock* was to have supported the plea; but,

The Court (a) intimating an opinion that the objection must prevail, he obtained leave to amend.

The plea was amended by introducing the averments here printed between brackets, and was again specially demurred to. The material grounds will appear by the argument. The demurrer was argued last term (b).

Sir *J. Campbell*, Attorney General, for the plaintiff Stat. 6 G. 4. c. 16. s. 8., on which this plea is founded, corresponds with stat. 5 G. 2. c. 30. s. 24.; and both are provisions for the benefit of creditors, not of the bankrupt. Under both the debt is to be forfeited, quoad hoc, that the creditor shall not claim any dividend upon it under the commission; but it is not to be released in favour of the bankrupt, who is *particeps criminis*. The agreement is void, and no action could be maintained on the bills; but the original debt is not extinguished. The plaintiff here is not seeking a benefit under the commission; and the commission appears not to have been prosecuted. The whole bearing of stat. 6 G. 4. c. 16. s. 8. is upon proceedings under the bankruptcy: the money or security received contrary to the act is to be paid or delivered up to such person as the commissioners shall appoint. "The commission is not issued for the benefit of the petitioning creditor alone, but is in the nature of an execution for the benefit of all the creditors. Therefore it is provided by the 8th section of the new statute,

(a) Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) January 24th. Before Lord Denman C. J., Littledale, Williams and Coleridge Js.

that

that, if the petitioning creditor *after striking a docket*, receive from the bankrupt any money, or security," &c., "whereby he may receive *more* in the pound than the other creditors, the commission is not only super-sedable, but the petitioning creditor is also liable to forfeit his whole debt, as well as to repay or deliver up the money, or security, to such persons as the commissioners shall appoint, for the benefit of the creditors." 1 *Deac. Bank. Law*, 102. And the cases which have been decided upon the two enactments in question shew that their object is considered to be the general interest of the creditors. This plea does not shew that any creditor has been injured. It is nowhere precisely averred that the plaintiff received, or bargained to receive, more in the pound than other creditors; nor does it even appear that his estate would not yield 20s. in the pound. It is not stated that the proceedings under the fiat went on, or a new fiat was issued; or that the defendant was adjudged a bankrupt; or that, when the payment was made and the bills accepted, there was any creditor who could be injured by that transaction.

W. H. Watson, contra. The plea follows the language of stat. 6 G. 4. c. 16. s. 8., which is grounded on stat. 5 G. 2. c. 30. s. 24.; and this latter clause was intended, as the recital declares, to prevent petitioning creditors from extorting the whole or an undue portion of their debts. The new act substitutes the words "after a docket struck," for "after issuing of any commission," and, like stat. 5 G. 2. c. 30., inflicts forfeiture in case of an illegal composition; but the expression is "whereby such person *may*," not "*shall*," as in the former statute,

1840.

 DAVIS
 against
 HOLDING.

1840.

 DAVIS
 against
 HOLDING.

“receive more in the pound in respect of his debts than the other creditors.” [*Coleridge J.* The words “more in the pound” seem to contemplate payment by dividend under the commission.] The words mean, whereby, in the event of a commission going on, he will receive more in the pound &c. The clause then enacts that, if a commission shall have issued, the Lord Chancellor may keep it in force, or a new one may issue; but the person receiving such money, security, &c., “shall forfeit his whole debt,” whether the commission shall have proceeded or not, and repay the money or give up the security to such persons as shall be appointed under the original or a new commission. There are no words rendering it necessary to the forfeiture of the debt that either the old or a new fiat should be actually proceeded upon. The argument that the bankrupt here is in *pari delicto* with the plaintiff can have no weight, since the agreement is void as being against the policy of the law. This appears from the judgment of Lord *Abinger C. B.* in *Davis v. Holding (a)* in the Court of Exchequer, and from those of the Court of Common Pleas in *Rose v. Main (b)*. The plea here shews that the plaintiff, by agreement, accepted from the defendant so much as would reduce his debt below 100*l.*, and took bills, in satisfaction of the residue, and whereby the plaintiff might receive more in the pound in respect of his debt than the defendant’s other creditors. It would have been for the jury to say, on a trial, whether the plaintiff, under the circumstances of the case, might have received more in the pound than other creditors if the commission had gone on. But, whether it proceeded or not,

(a) 1 *M. & W.* 159. *S. C.* *Tyr. & G.* 371. (b) 1 *New Ca.* 357.

an injury was done to the creditors, within the meaning of the statute. Stat. 6 G. 4. c. 16. s. 8. does not say that the debt shall be forfeited to the debtor; but neither does it enact that the forfeiture shall be to the creditors.

1840.

DAVIS
against
HOLDING.

Sir *J. Campbell*, Attorney General, in reply. The recital of stat. 5 G. 2. c. 30. s. 24. shews that the object was benefit to the creditors. Forfeiture, in this case, implies a refunding; and such refunding must be for the benefit of the creditors, and under a fiat. Every forfeiture must, *ex vi termini*, be to some person: the term is a relative one; and here it can have effect only where there are creditors and a commission. The provision of stat. 6 G. 4. c. 16. s. 8., that, if any commission shall have issued, the Lord Chancellor may keep it in force or grant a new one, shews that the legislature contemplated the machinery of a commission as necessary for enforcing the enactments as to forfeiture and refunding. It is argued that this plea follows the words of sect. 8: but it is not enough that a pleading should pursue the general language of such an enactment; and the word "may" cannot be adopted in the hypothetical sense which the defendant would give to it. *Davis v. Holding* (a), in the Exchequer, shews that the bills of exchange were no satisfaction of the 90*l.* 11*s.*; the plaintiff, therefore, may well sue on the original consideration.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

This is an action for goods sold and delivered, to

(a) 1 *M. & W.* 159. *S. C. Tyr. & G.* 371.

which

1840.

 DAVIS
 against
 HOLDING.

which a plea is pleaded (framed on the eighth section of stat. 6 G. 4. c. 16.), which discloses an agreement, before adjudication, to deliver, and the delivery of, two bills of exchange as a security to the plaintiff, the petitioning creditor, for part of his debt, in consideration of his abandoning the proceedings under the fiat; but the plea does not aver that the plaintiff has thereby, or could in fact have, received more in the pound than the other creditors (though this is averred to have been the object of the agreement), or that the defendant had not assets wherewith to satisfy all his creditors their demands in full, or that the original fiat has been proceeded with, or any new one issued. The question is, whether the facts so disclosed in the plea bring the case within the eighth section *as between these parties*, so that, in the words of that section, the plaintiff "shall forfeit his whole debt."

This same plea in substance, *mutatis mutandis*, was pleaded between the same parties to an action on one of the bills; and the Court of Exchequer held it to be an answer to that action (*a*); but that decision proceeded on grounds independent of the statute. In this case, as the original transaction was free from all objection, the plaintiff must recover unless he be brought within the letter and spirit of the section.

It appears to us that the legislature clearly contemplated the case of the proceedings in bankruptcy being prosecuted; and, in that case, the double benefit of withdrawing from the general body of claimants in respect of that particular debt the creditor offending against the statute, and also of making him refund the

(a) *Davis v. Holding*, 1 M. & W. 159. S. C. Tyr. & G. 371.

money

money paid, or deliver up the security given unlawfully in respect of it. The words of the section all point to this; and the forfeiture of the debt appears so coupled with the repayment of the money, or the delivery up of securities, that where neither of these can be done, as in this case, the words of forfeiture do not apply. It is worthy of remark that there are no words in the section which make the security void, only that it is to be delivered up for the benefit of the creditors; and this wording of the statute seems in accordance with its probable intention: for, although the agreement in question is illegal, as "an abuse of a process which a creditor" sues out, "not for his own benefit only, but for that of the other creditors also" (a); yet, in a case where no other creditors interfere, and therefore it may be taken that none have any interest in keeping alive the fiat, or suing out a new one, there seems no reason why, as between the parties themselves, the original debt should not continue, with the remedy for its recovery.

The judgment of the Court therefore will be for the plaintiff.

Judgment for the plaintiff.

(a) *Davis v. Holding*, 1 M. & W. 165. S. C. Tyr. & G. 374.

1840.

DAVIS
against
HOLDING.

1840.

Monday,
February 3d.

CADBY *against* MARTINEZ.

Lease for twenty one years from *Michaelmas* 1823, with covenant that, if the tenant should desire to determine the demise at the end of the first fourteen years, and should leave or give six calendar months' notice immediately preceding the expiration of the first fourteen years, the lease should determine.

The tenant, six months before the *June* preceding the expiration of the first fourteen years, gave notice that he should quit on 24th *June* 1837, agreeably to the covenants of the lease.

Held, that this notice did not satisfy the covenant.

And that the jury could not be asked whether, from the landlord's conduct, as shewn in evidence, they believed that he understood the notice to refer to *Michaelmas* 1837.

DEBT for one quarter's rent, due *December* 25th, 1837, under a demise by plaintiff to defendant of a messuage &c., for twenty-one years from *Michaelmas-day* 1823. Plea, that the demise was by indenture, with a covenant that, if defendant, his executors, &c., should be desirous to determine the tenancy at the end of the first seven or fourteen years, and should leave or give six calendar months' notice to the plaintiff, his executors, &c., immediately preceding the expiration of the first seven or fourteen years, the demise should determine; and that defendant, towit on &c., gave notice of determining &c. at the end of the first fourteen years, towit at *Michaelmas day* 1837, and thereby the demise became and was then determined, long before the time mentioned in the declaration &c. Verification. Replication (after oyer of the indenture, which contained a covenant as above stated), that defendant did not give six calendar months' notice immediately preceding the expiration of the first fourteen years, in manner and form &c. Issue thereon.

On the trial, before Lord *Denman* C. J., at the sittings in *Middlesex* after *Easter* term, 1838, it appeared that defendant had, on *November* 1st, 1836, given notice to plaintiff by letter, as follows.

"Sir, I hereby give you notice that I shall quit and deliver up, on the 24th day of *June* 1837, the house and premises situate and being No. 1. *Mabledon Place, New Road*, in the parish of *St. Pancras*" (the premises in

in question), "agreeable to the covenants of the lease subsisting between us, and dated the 22d day of *August* 1823. I am," &c.

1840.

CADBY
against
MARTINEZ.

Plaintiff, on *November* 27th, wrote an answer, simply acknowledging the receipt of defendant's letter. In *June* 1837, no further communication having passed, defendant found that he had, by mistake, given notice for a wrong day, and wrote to plaintiff, pointing out the error, and offering to give up the premises on *June* 24th or *September* 29th, and to pay rent accordingly. Plaintiff observed, in answer, that the notice was not good; and, in a subsequent conversation with defendant's agent, he said, "Your notice is not a good one: I saw that the moment it was delivered to me; but it was not for me to say so." The Lord Chief Justice observed that the defendant's notice was qualified by the words "agreeable to the covenants of the lease," and left it to the jury to say whether the plaintiff had not understood the notice as applying to the last day of the fourteen years, and acquiesced in it by his silence. The jury thought that the plaintiff had understood the notice as referring to the last day; and a verdict was found for the defendant, but with leave to move to enter a verdict for the plaintiff.

R. V. Richards, in the ensuing term, moved to enter a verdict accordingly, or for a new trial. He cited *Johnstone v. Hudlestone (a)*. [Lord *Denman* C. J. There less than half a year's notice had been given. Here the notice was at all events early enough; the question at the trial was, whether or not the landlord understood it as terminating on the proper day.] The words are

(a) 4 B. & C. 922.

"the

1840.

 CADBY
 against
 MARTINEZ.

"the 24th day of *June* 1837," "agreeable to the covenants" &c.: that raises an ambiguity which cannot be cured. He also cited *Doe dem. Spicer v. Lea* (a). In last *Hilary* term (b),

Erle and *Byles* shewed cause. The covenant in the lease requires merely that the plaintiff should have six months' notice of the defendant's desire to determine the demise at the end of the fourteen years. The defendant could understand the notice which was actually given no otherwise than as signifying such a desire. It expressly referred to the covenant, and was unmeaning upon any other construction, since there was only one time at which, agreeably to the covenant, the premises could be quitted. The 24th of *June*, 1837, was not such a time; and the plaintiff must have construed the notice, which was thus far repugnant, so as to make sense. Had no day been mentioned, the notice would have been consistent; the day named must therefore be rejected. In *Doe dem. Spicer v. Lea* (a) it was held that "the feast of *St. Michaelmas*," named in a lease as the day from which the lessee was to hold, must mean *New Michaelmas day*; and that a notice to quit on 11th *October*, *Old Michaelmas day*, was bad, though given more than six months before either. That turned entirely on the construction to be given to the lease; the notice named a particular day, and did not, as here, refer to the terms of the deed. In *Doe dem. Duke of Bedford v. Kightley* (c) the notice was to quit "at *Lady day*, which will be in the year 1795;" and,

(a) 11 *East*, 312.

(b) *January* 16th. Before Lord Denman C. J., *Littledale* and *Cole-ridge* Js.

(c) 7 *T. R.* 63.

it appearing that the notice was served just before *Michaelmas* 1795, the Court held that the meaning must be "*Lady day* 1796," the day actually named being impossible, and the conduct of the parties being taken into account. In *Doe dem. Williams v. Smith* (a) the holding was from 2d *February*; and, on 22d *October*, notice was served to quit "at the expiration of half a year from the delivery of this notice, or at such other time or times as your *present* year's holding" "shall expire after the expiration of half a year from the delivery of this notice." The "*present*" year's holding expired on 2d *February* then next, which was less than six months from the delivery; but the Court referred it to the 2d *February* next but one, rejecting the word "*present*" as surplusage. In *Doe dem. Cox v. —* (b) the premises in question were called *The Bricklayer's Arms*; but the notice described them as "the premises which you hold of me, situated" &c., "commonly called or known by the name of *The Waterman's Arms*." There was no house called *The Waterman's Arms* in the parish: but it was considered that the party receiving the notice could not have been misled; and the notice was therefore taken to refer to *The Bricklayer's Arms*. In *Doe dem. Lord Huntingtower v. Culliford* (c) it was decided that a notice, dated 27th *September*, and served 28th *September*, to quit "at *Lady day* next, or at the end of your current year," which in fact ended on 29th *September*, must be referred to the year which would begin to run after the 29th *September* then next. In *Doe dem. Matthewson v. Wrightman* (d) the notice was to quit "on the 25th day of *March*, or the 8th day of *April* next

1840.

 CASEY
 against
 MARTINEZ.

(a) 5 A. & E. 350.

(b) 4 Esp. 185.

(c) 4 D. & R. 248.

(d) 4 Esp. 5.

ensuing;"

1840.

 CADDY
 against
 MARTINEZ.

ensuing," and it appeared that this was served on *New Michaelmas day*: the day of the demise was after the 8th of *April*; and Lord *Kenyon* held that the notice, though in the alternative, was a good six months' notice, if the tenancy commenced on either 25th *March* or 8th *April*; and that it lay on the party receiving such six months' notice to shew the true time of commencement, if material to his case. The conduct of the parties is as properly given in evidence, here, as the actual day of the commencement of the holding where the notice is simply for the expiration of the year without naming a day. In *Doe dem. Eyre v. Lambly* (a) the assertion of the party receiving the notice was deemed conclusive evidence of the day of commencement; and in *Doe dem. Clarges v. Forster* (b) the tacit acquiescence of such party was taken as *prima facie* evidence. Here the jury, upon the evidence, have found that the party receiving the ambiguous notice understood it rightly. Indeed it might be contended, if no words can be rejected, that the defendant gave notice to determine the demise at the proper time, intimating at the same time an intention to quit earlier, which he might lawfully do, provided he paid the rent and performed the other covenants. Or the jury might, from the plaintiff's conduct, infer a verbal notice correctly framed: a written notice was not necessary.

Sir *W. W. Follett* and *R. V. Richards*, *contra*. It is very doubtful whether a verbal notice would have been good, especially as the covenant requires that the tenant should "leave or give" it. But, here, no doubt the

(a) 2 *Esp.* 635.

(b) 13 *Ess.* 403.

plaintiff's

plaintiff's whole conduct had reference to the notice which was in evidence; and no other view was suggested at the trial. Now the meaning of a written instrument cannot be explained by the conduct of the parties. If there be an inconsistency in the document, no reason can be assigned for rejecting one part rather than the other: at any rate, this should not be done in favour of the party framing the notice. In *Doe dem. Duke of Bedford v. Kightley* (a) the day named appeared to be impossible, by reference, not to the legal rights of the parties on the lease, but to the day of service. *Doe dem. Cox v. ———* (b) was a case of latent ambiguity. Then, *Doe dem. Spicer v. Lea* (c) has not been distinguished. There the difficulty might have been got rid of, if the position of the parties had been taken into consideration, as the defendant says it may be here. That case was recognised in *Smith v. Walton* (d), where it was held that the words "*Martinmas* 1830, towit on 23d November 1830," in a record, meant *New Martinmas*, 11th November, and that "*Martinmas* 1830" was not controuled by what followed. In *Johnstone v. Hudlestone* (e) it was held, on demurrer, that a tenancy was not determined by the landlord's accepting and assenting to an insufficient notice to quit given by the tenant. Even if the parties here had met after the service of the notice, and had agreed to consider the notice good, that would not have cured the defect: they could only have waived the former notice and have given and received a new one, as in *Doe dem. Brierly v. Palmer* (g).

1840.

 CADDY
against
MARTINEZ.
Cur. adv. vult.

(a) 7 T. R. 63.

(b) 4 Esp. 185.

(c) 11 East, 312.

(d) 8 Bing. 235.

(e) 4 B. & C. 922.

(g) 16 East, 53.

1840.

CADBY
against
MARTINEZ.

Lord DENMAN C. J. now delivered the judgment of the Court. After having shortly stated the pleadings and the notice proved, his Lordship proceeded as follows.

It was submitted that the error of this notice in point of time was cured by the plaintiff's conduct, who had written on the 27th of *November* to acknowledge the receipt of the defendant's letter dated the 1st. A long time after, he told the defendant that he had perceived the defect in the notice, but that it was no business of his to point it out. The opinion of the jury was that the plaintiff understood the notice to apply to the last day of the fourteen years; and a verdict was entered for the defendant, subject to our opinion whether the term was put an end to; more correctly, perhaps, whether the evidence was admissible.

We have heard the case argued, and are of opinion that the covenant to pay rent during the whole term cannot be got rid of by any notice to quit which is not in accordance with the proviso introduced into the lease for the purpose.

The cases that seemed to point the other way merely shew that, where there is no covenant, a notice describing the premises, so as to be perfectly understood between the parties, will be sufficient: but in none has a proviso or covenant in a deed been held to be satisfied by a notice inconsistent with the terms of it. The case of *Doe dem. Spicer v. Lea* (a) is to this effect, and is indeed a strong case; but no authority is required for so plain a proposition. The rule for entering a verdict for the plaintiff must therefore be absolute.

Rule absolute, to enter verdict for plaintiff.

(a) 11 *East*, 312.

1840.

The QUEEN *against* PRICE.Monday,
February 3d.

THE defendant was tried before Lord Denman C. J. at the *Warwickshire* Spring assizes, 1839. A verdict of Guilty was taken by consent, with leave to move the Court to enter a verdict of Not guilty. On motion to that effect by *Goulburn* Serjt. in *Easter* term, 1839, the Court directed the facts to be stated in a special case. The case was stated as follows.

This was an indictment (a) against *Benjamin Price* for a misdemeanor in refusing to register the birth of his child, pursuant to stat. 6 & 7 W. 4. c. 86., intituled "An act for registering births, deaths, and marriages in *England*." The indictment was to be considered as part of the case. The plea was Not guilty.

Under stat. 6 & 7 W. 4. c. 86. s. 20., the father of a child, if requested by the registrar within forty-two days after the birth, is bound to inform the registrar of the particulars required by the act to be registered touching the birth. And, if he refuse the information on such request, he is indictable for a misdemeanour.

Benjamin Price, the defendant, was a housekeeper residing in *High Street, Birmingham*, in the year 1838; and, on 30th *May* in that year, his wife was delivered at his house of the child mentioned in the indictment. *High Street* then was, and still is, situate within *Saint Peter's* district, which at that time was, and still is, a registrar's district for the registration of births and deaths within the same. At the time of the birth of the child, and of the request and refusal hereinafter stated, *George Bynner* was acting as the registrar of births and deaths within *Saint Peter's* district, and had been so acting for a considerable time previously. *George Bynner* was examined as a witness at the trial,

(a) See it set out at the end of this case, p. 738.

1840.
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The QUEEN
against
PRICE.

and stated that he was the registrar of the said district, and acted as such at the times in question; and it was objected, by the counsel for the defendant, that his appointment ought to be proved, which was not done. On 16th *June* 1838, *Bynner* went to the defendant's house, had an interview with him, and told him that he was come as registrar to register the birth of defendant's child, and asked for information as to the day on which the child was born, and the other particulars required by the statute. The defendant refused to give any of the information required, on the ground that he intended to have the child registered at church, and that the law did not apply to members of the established church. *Bynner* told the defendant that the registry act required every parent to give information on being requested to do so by the registrar. The defendant said that he objected to do so on principle, and again refused to give any of the information required. On two subsequent occasions, within less than forty-two days of the birth of the child, the said *George Bynner* saw the defendant, and requested him to give him the information required by the act; and, upon the last occasion, the defendant stated that he knew what the particulars were which were required by the act, and that he had the schedule before him at that moment. On both these occasions he refused the information required, or any part of it, and never, in point of fact, did give information as to any of the several particulars required to be known and registered touching the birth of the child, but referred the person requiring such information to the registry at the church where the child had been baptized.

The questions for the opinion of the Court were:—

1. Whether sufficient evidence was given of the said
George

George Bynner being the registrar of the district in question; and, 2. Whether the indictment be sustainable: the verdict and judgment to be entered accordingly.

1840.

The QUEEN
against
PRICE.

The case was argued in last *Michaelmas* term (a).

Sir *J. Campbell*, Attorney General, for the Crown. The first question is, whether sufficient proof was given of the appointment. Sect. 1 of the Registration Act, stat. 6 & 7 *W. 4. c. 86.*, recites that it is expedient to provide the means for a complete register of births &c.; and sect. 2 enables the Crown to provide an office in *London* or *Westminster*, to be called "The General Register Office," for keeping a register of all births, &c., and to appoint a registrar general of births, &c. Sect. 7 directs that the guardians of unions, &c., under stat. 4 & 5 *W. 4. c. 76.*, shall divide their union, parish, &c., into registrars' districts, appoint a registrar of births and deaths in each district, and fill up vacancies; and the clerk to the guardians, or, in case of his refusal or disqualification, a person appointed by the guardians, is to be superintendent registrar, the guardians filling up vacancies. Here it appeared that the officer acted as registrar. (The first point was given up on the part of the defendant.) As to the second point, sect. 18 directs that the registrars be furnished with register books of births, &c.; "and every registrar shall be authorised and is hereby required to inform himself carefully of every birth and every death which shall happen within his district after the said 1st day of *March*, and to learn and register as soon after the event as conveniently may be done, with-

(a) *November 16th and 18th, 1839. Before Lord Denman C. J., Patterson, Williams, and Coleridge Js.*

1840.

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The QUEEN
against
PRINC.

out fee or reward save as hereinafter mentioned, in one of the said books, the particulars required to be registered according to the forms in the said schedules (A.) and (B.) respectively touching every such birth or every such death, as the case may be, which shall not have been already registered." Here a duty is thrown on the registrar, who is to register upon obtaining the information. The parish register shews only the baptism, not the birth; and it does not contain many of the particulars in schedule (A.), such as the maiden name of the mother, the rank and profession of the father, the signature, description, and residence of the informant. Such registrations are left as before the act, by sect. 49. But parish registers would often not contain the names of dissenters; and cases might be suggested where the parochial registration of burials would not supply information as to deaths, as where a person dies in an hospital out of the parish in which he is buried. Then sect. 19 enacts "that the father or mother of any child born, or the occupier of every house or tenement in *England* in which any birth or death shall happen after the said 1st day of *March*, may, within forty-two days next after the day of such birth or within five days after the day of such death respectively, give notice of such birth or death to the registrar of the district." Here the language is permissive only, as to the parent, &c. Then sect. 20, on which the indictment is framed, enacts "that the father or mother of every child born in *England* after the said 1st day of *March*, or in case of the death, illness, absence, or inability of the father and mother, the occupier of the house or tenement in which such child shall have been born, shall, within forty-two days

days next after the day of every such birth, give information, upon being requested so to do, to the said registrar, according to the best of his or her knowledge and belief, of the several particulars hereby required to be known and registered touching the birth of such child." This section imposes a duty on the parent, with the public object recited in the act. With the same view, sect. 32 directs that certified copies of the register shall be sent quarterly, and finally the register itself, to the superintendent registrar, who (sect. 34) is to transmit the certified copies to the registrar general: further provisions are made for reference to these copies: and, by sect. 38, certified copies, purporting to be sealed or stamped with the seal (*a*) of the register office, are to be received as evidence of the birth, &c., without further proof of the entry. Sect. 41 makes it perjury to give false information. Sect. 42 inflicts a penalty on the registrar who refuses, or without reasonable cause omits, to register a birth, &c. Sect. 43 makes it felony to wilfully injure, &c., the book or certified copy, or to counterfeit any part of a register or certified copy, or give a false certificate, or forge the office seal. Sect. 50 provides for giving public notice of "the several acts required to be done by persons who may be desirous of solemnizing marriage, or of registering the birth of any child," &c., "under the provisions of this act." The word "desirous," in this last section, cannot qualify the imperative words in sect. 20.: it probably refers to sect. 19, where the right is given to the parent. But sect. 20 is express; and from the general tendency of the other sections cited it is clear that the intention was to

1840.

THE QUEEN
against
PRICE.

(a) See *Doe dem. Duncan v. Edwards*, 9 A. & E. 554.

1840.

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The QUEEN
against
PRICE.

compel the parent to perform a duty essential to the general good contemplated by the act. Therefore a disobedience is, by the principle of the common law, an indictable misdemeanor. In *Hawk. P. C. b. 1. c. 22. s. 5. (a)*, it is said that "every contempt of a statute is indictable, if no other punishment be limited." And, in the same work, *b. 2. c. 25. s. 4. (b)*, it is said, "It seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet if the party offending have been fined to the King in the action brought by the party, as it is said that he may in every action for doing a thing prohibited by statute, it seems questionable, whether he may afterwards be indicted; because that would make him liable to a second fine for the same offence. Also, if a statute extend only to private persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, as those relating to distresses made by lords on their tenants, it is said that offences against such statute will hardly bear an indictment." In *4 Blackst. Com. 122.*, after certain commands by the crown have been mentioned, it is said, "Disobedience to any of these commands is a high misprision and contempt: and so, lastly, is disobedience to any act of parliament,

(a) Vol. 1. p. 150. 7th ed.

(b) Vol. 4. p. 3. 7th ed.

where

where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment, at the discretion of the king's courts of justice." This case is not within any of the exceptions: it is neither a violation of a mere private right, nor one for which any specific punishment is provided. In *Rex v. Robinson* (a) a party was held indictable for disobeying an order of maintenance by quarter sessions. In *Rex v. Davis* (b) an overseer was held to be indictable for not receiving a pauper duly removed. From *Rex v. Stubbs* (c) it appears that parties are bound to take on themselves, when properly appointed, the office of overseer. Indictment lay for not performing statute duty; *Rex v. Boyall* (d): for disobeying an order of council under the Quarantine Act, stat. 26 G. 2. c. 6. s. 1.; *Rex v. Harris* (e); and there, à fortiori, the indictment would have lain, if the act, instead of prescribing obedience to the order in council, had embodied the order.

1840.

The QUEEN
against
PRICE.

Sir *F. Pollock*, contra. The statute was intended merely to enable parties, who chose to avail themselves of it, to secure a means of reference. Were it otherwise, it might have been expected that the act would contain some general preamble as to the importance of excluding perjury in cases of contested pedigrees, or of assisting statistical researches. The Parochial Registration Act, 52 G. 3. c. 146., is recited in the preamble, and the insufficiency of that act is pointed out, it being applicable only to members of the established church. It may be inferred that the general objects of

(a) 2 Bur. 799. See *Regina v. Crossley*, 10 A. & E. 132: *Rex v. Wright*, 1 Burr. 543.

(b) Cited in *Rex v. Robinson*, 2 Bur. 803.

(d) 2 Bur. 832.

(c) 2 T. R. 395.

(e) 4 T. R. 202.

the

1840.

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The QUEEN
against
PARENT.

the two acts were the same. Now stat. 52 G. 3. c. 146. was clearly not compulsory on the parent: and no punishment is there imposed on a party neglecting to avail himself of the provisions; the only punishment, sect. 14, is for falsifying entries or copies. Sect. 50 of stat. 6 & 7 W. 4. c. 86. may also be considered a legislative declaration of the general intent of the act; namely, to provide registration for such as desired to register. The "persons" "desirous of solemnizing marriage, or of registering the birth," cannot be the officer: in the "act for marriages" immediately preceding, stat. 6 & 7 W. 4. c. 85. s. 21., provision is made for persons marrying, who may "solemnize marriage" as there provided. So sect. 19 of stat. 6 & 7 W. 4. c. 86. confers a privilege; for the parent "may" give notice within forty-two days; and, by sect. 22, if the notice be delayed for forty-two days, the registrar, for the six months after the birth, can register only under the particular directions of that section, and is to receive an additional fee; and the registration, after the expiration of that six months, is (by sect. 23) absolutely forbidden. This shews that the only penalty imposed on the parent is that of losing, by his neglect, the advantage of having his child registered. The case falls within the admitted exceptions to the rule that non-compliance with a statute is an indictable misdemeanor: the statute gives merely a private right, and that to the party here complained against. The language of sect. 20 is insisted upon: but such language is used in parliamentary provisions the disobedience to which would not be indictable. Thus, in the Uniformity of Process Act, 2 & 3 W. 4. c. 39., sect. 1 directs that in every writ of summons the residence of the defendant, &c., "shall be

be mentioned." Sect. 66 of the Municipal Corporation Act, 5 & 6 W. 4. c. 76., enacts that a party entitled to compensation "shall deliver" a statement of his claims. Where a duty is imposed in stat. 6 & 7 W. 4. c. 86., penalties are specifically ordered for non-performance; as, in sect. 42, a penalty of 50*l.*, which precludes an indictment for misdemeanour, is imposed on the officiating person refusing to register a marriage, or the registrar refusing to register a birth or death of which he has notice: and it may be observed that, without this notice, even the registrar is not responsible; else this inconsistency would arise; that the registrar would be indictable if he had not notice, but not if he had notice. Sect. 28 enacts that the party giving information "shall sign his name," &c., in the register; and the register is not evidence without such signature: yet could a party be indicted for not signing? There is no provision for the case of those who cannot write. Sect. 7 enacts that the guardians of unions "shall" divide the unions into districts for registration; yet they could not be indicted for omitting to do so: stat. 7 W. 4. & 1 Vict. c. 22. s. 13. provides for this being done, on their default, by the Poor Law Commissioners. Therefore the exception in the passage cited on the other side from *Hawkins, Pl. Cr. b. 2. c. 25. s. 4.*, applies; "unless such method of proceeding do manifestly appear to be excluded" by the statute.

Then, as to the indictment. Each count contains an averment negating the information having been given by any party besides the defendant: and that was clearly necessary. In *Rex v. The Bishop of London* (a) it was held that no mandamus lay to the Bishop of London

1840.

The Queen
against
Prick.

(a) 13 East, 419.

1840.

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The QUEEN
against
PRICE.

to licence a preacher until the Archbishop of *Canterbury* had been applied to, stat. 13 & 14 C. 2. c. 4. s. 19. giving the power to either the Archbishop of the province or the Bishop of the diocese. But here is no allegation that the wife has been applied to at all; though, under sect. 20 of stat. 6 & 7 W. 4. c. 86., "the father or mother" is to give the information. The registrar cannot have the right to choose on which he will throw the duty. By sect. 25, "some person present" at a death, or, if there be no such person, an occupier or inmate, must give the information. Would it be enough for the registrar to indict any one person present? The indictment must shew that all proper means of acquiring information have been resorted to.

Further, the facts do not support the conviction. It should be shewn that the child has not been registered in the parish register. The duty of the registrar, by sect. 18, is confined to births "which shall not have been already registered." And it should have been shewn that enquiry was made of the defendant, specifically, as to the several particulars required; all that was done seems to have been to throw it on the defendant to ascertain what particulars were wanted.

Sir *J. Campbell*, Attorney General, in reply. The words *not already registered*, in sect. 18, refer, not to a parochial register, but to a registration under this act. The parish register will not contain the particulars required by the act. As to the registration being forbidden after six months from the birth, that provision was made to guard against error; but it does not shew that giving the information is optional. It is said that sect. 22 inflicts a penalty; but that is no legal penalty upon

upon the party refusing the information. It is not true that the registrar is liable for neglect of duty only if he have regular notice from the father &c. : sect. 42 is confined to cases where such notice, or at any rate some notice, has been given ; but the registrar would be indictable, under sect. 18, if he did not "inform himself carefully of every birth," &c. As to sect. 28, a person who could not write might make his mark, as under the Statute of Frauds or the Statute of Wills. If he refused to do so, he might be indicted. The Uniformity of Process Act has been referred to : but there the protection given was to rights strictly private ; here the purpose is public. It is said that the indictment ought to shew a request from the mother : but sect. 20 throws the duty on either parent, if reasonably requested. *Rex v. The Bishop of London* (a) was decided on the principle that no mandamus shall be granted where there is another adequate remedy. As to the enquiry made of the party, he stated that he knew the particulars ; and he refused to give them on an alleged principle of conscience. That is, legally, a contemptuous refusal, which is indictable.

1840.

The Queen
against
PRICK.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.

Though, in the course of this argument, much doubt was raised in our minds respecting the general intention of stat. 6 & 7 W. 4. c. 86., whether it tendered a benefit to individuals, leaving them the option of accepting or declining it, or required them to do the acts necessary for completing the registration, yet we have at length

(a) 13 East, 419.

come

1840.

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The QUEEN
against
PRICE.

come to the conclusion that the words of the twentieth section, at least, are too strong to be got over or controlled. The registrar would clearly be indictable for neglect of the various duties imposed upon him, where no provision is made for punishment by summary proceeding: those duties cannot be performed unless the necessary information is imparted to him. This might still leave it doubtful whether parties are bound by law to impart it: but the words of this clause are unambiguous and imperative. "The father or mother of every child born in *England*," or, under the circumstances stated, "the occupier of the house" in which the child shall have been born, "*shall*, within forty-two days next after the day of every such birth, *give information, upon being requested so to do*, to the said registrar, according to the best of his or her knowledge and belief, of the several particulars hereby required to be known and registered touching the birth of such child." Here is a direct and positive injunction, on persons in the defendant's situation, to give the information required of him by the registrar, and by him withheld. And, looking to the general object and effect of the recent law, we cannot avoid holding that the matter is of public concern.

He is therefore brought within the principle and the very words of the decisions alluded to, having wilfully (though in one sense innocently) refused to do that which he was lawfully required under the act to do.

Judgment for the Crown (a).

(a) The first count of the indictment stated, "that heretofore, and after the last day of *June* A. D. 1837, and within forty-two days next after the day of the birth of the child in this count after mentioned, to wit on 16th *June* A. D. 1838, at the pariah of *Birmingham*, in the county of *Warwick*, *Benjamin Price*, late of the pariah aforesaid, in the county aforesaid,

said, dealer in glass, being then and there the father of a certain child then lately, and within forty-two days then next preceding, and after the said last day of *June* A. D. 1837, born in *England* within a certain district situate in the said county of *Warwick*, called the *St. Peter's* district (the same district being then and there, and before and at the time of the birth of the said child, and from that time always hitherto, a registrar's district for the registration of births and deaths within the same, according to the laws then and now in force concerning the registration of births and deaths), was requested by one *George Bynner*, then, and before and at the time of the birth aforesaid, and from that time always hitherto, and still, being, towit there, the registrar of births and deaths within the said district in this count mentioned, to give information to him the said *G. B.*, so then and there being such registrar as aforesaid, according to the best of his the said *B. P.*'s knowledge and belief, of the several particulars by a certain act" &c. (stat. 6 & 7 *W. 4.* c. 86.) "required to be known and registered touching the birth of the said child in this count mentioned. And the jurors" &c. "that the said *B. P.* was not, at the time of making the request aforesaid, ill, absent, or in anywise unable to give such information as aforesaid, but then and always thereafter, towit there, well knew the said several particulars, and could and might and ought to have given the same information to the said *G. B.*, so being such registrar as aforesaid; and that the said *B. P.* then and there had notice of all and singular the premises in this count mentioned. And the jurors" &c. "that the said *B. P.*, contriving and intending to prevent the due execution of the law relating to the registration of births, then and there, towit on the said 16th day of *June* A. D. 1838, at" &c., "upon being so requested as aforesaid, did unlawfully and contemptuously wholly refuse to give to the said *G. B.*, being then and there such registrar as aforesaid, information according" &c. "of the said several particulars by the same act" &c., "touching the birth of the said child, or of any of the said particulars: and that the said *B. P.* did not nor would, when he was so requested as aforesaid, or at any other time within the said forty two days next after the day of the birth of the said child, which elapsed long before the taking of this inquisition, or at any other time before or since, give the said information, or any part thereof, according to the best of his knowledge and belief, or otherwise howsoever, to the said *G. B.*, so being such registrar as aforesaid, or to any other person, and always thereafter unlawfully and contemptuously wholly refused and neglected so to do, towit at the parish" &c. "And the jurors" &c. "that neither the mother of the said child, or any other person, ever did give the said information or any part thereof to the said *G. B.*, or to any other person. In contempt" &c., "against the form" &c.

The second count stated the child to have been "lately and within forty two days then next preceding, and after the said last day of *June*, A. D. 1837, towit on the 30th day of *May* A. D. 1838, born" &c. (as in the first count);

1840.

The Queen
against
Paine.

1840.

The QUEEN
against
PASCY.

count); it stated that *B. P.* was "duly and according to the provisions of the said act of parliament requested by the said *G. B.*, then and before" &c. (as in the first count), to give information, "according to the provisions of the said act of parliament, of the several particulars by the said act of parliament required to be known and registered touching the birth of the said child in this count mentioned; that is to say, when such child was born; the name of such child, if any; the sex of such child; the name and surname of the father of such child; the name and maiden surname of the mother of such child; and the rank and profession of the father of such child." The intent laid was, "to prevent the due registration of the birth last aforesaid, and to prevent the due execution of the law thereto relating." The defendant was charged to have refused, "with force and arms," to give information &c., and to have been "often duly requested within the said last mentioned forty-two days so to do." The count negatived that the mother or any other person gave information, "in any manner whatsoever, to the said *G. B.* In contempt" &c.

Third count. "That heretofore, and after the said last day of June A. D. 1837, and before and at the time of the birth of the child in this count after mentioned, to wit on the 16th day of June A. D. 1838, at the parish" &c., "the said *G. B.* was and thenceforth hitherto hath been, and still is, the registrar, according to the provisions of an act" &c., "of births and deaths within a certain district in the county aforesaid, then, and during all the time last aforesaid, called by a distinct name, to wit *The St. Peter's* district, and then, and during all the time last aforesaid, and still, being a registrar's district, to wit a temporary district within the meaning and provisions of the same act of parliament, and the same district having been, before the said time of the birth last aforesaid, duly formed and made into a district, to wit a temporary district, according to the provisions of the same act of parliament. And the jurors" &c. "that, on the 16th day of June A. D. 1838, to wit at the parish" &c., "the said *B. P.* was the father of a child born in *England*, and within the said district in this count mentioned, then, to wit at the time of such birth, and always thereafter, being such a registrar's district as last aforesaid, to wit in a certain house in the parish aforesaid, of which said house the said *B. P.* was then and there, and during all the time last aforesaid, the occupier; and which said child was born after the said last day of June A. D. 1837, to wit on the 16th day of June A. D. 1838. And the jurors" &c. "that the said *B. P.*, so being such father as last aforesaid, after the birth of such child as last aforesaid, and within forty-two days next after the day of such birth as last aforesaid, and at and in a reasonable time in that behalf, to wit on the said 16th day of June in the year last aforesaid, to wit at the parish" &c., "and within the district in this count mentioned, was duly, and according to the provisions of the same act of parliament, requested by the said *G. B.*, so then and there being such registrar as in this count mentioned, to give to the said *G. B.*, so then and there being such registrar as in this count mentioned, according to the best of the knowledge and belief
of

of him the said *B. P.*, information of the several particulars by the same act of parliament required to be known and registered touching the birth of the said last mentioned child. And the jurors " &c. "that the said *B. P.* was not, at the time of the making such request as last aforesaid, ill" &c., "but then and always thereafter, to wit there, well knew the said last mentioned particulars, and could, and might, and ought to have given the same information to the said *G. B.*, so then and there being such registrar as last aforesaid; and that neither the mother of the said last mentioned child, nor any other person, either before or at or after the time of the making such request as last aforesaid, ever gave the said last mentioned information, or any part thereof, in any manner whatsoever, to the said *G. B.*, or to any other person whatsoever. And the jurors" &c. "that the said *B. P.*, at the time of making such request as last aforesaid, to wit there, had notice, and well knew, that the said *G. B.* was such registrar as aforesaid, and all and singular other the premises in this count mentioned. And the jurors" &c. "that the said *B. P.*, well knowing all and singular the said premises in this count mentioned, but disregarding the said statute, and unlawfully contriving and intending, as much as in him lay, to hinder, prevent, and obstruct the due execution thereof, did not nor would, when he was so requested as last aforesaid, or at any other time within forty-two days next after the day of the said last mentioned birth, which elapsed before the taking of this inquisition, or at any other time whatsoever, give information to the said *G. B.*, so being such registrar as last aforesaid, according to the best" &c., "or otherwise howsoever, of the said several particulars" &c., "touching" &c., "or of any of them; and that the said *B. P.*, well knowing, and contriving and intending, as last aforesaid, then and there, upon being so requested as last aforesaid, and always thereafter, with force and arms, unlawfully and contemptuously refused to give such information as last aforesaid, or any part thereof, to the said *G. B.*, so being such registrar as last aforesaid. In contempt" &c.

The fourth count stated, as in the third, that *G. B.* was and is a registrar "of births and deaths within a certain district in the county of *Warwick*, being a registrar's district for the registration of births and deaths, then, and during all the time last aforesaid, called by a distinct name, to wit the *St. Peter's* district, and then and during all the time last aforesaid, and still, being a registrar's district within the meaning and provisions of the same act of parliament, and the same district having been, before the time" &c. (as in the third count), "and still being, such district as last aforesaid." In the allegation following, the house was said to be "in the parish aforesaid, and within the district last aforesaid." The request to *B. P.* was stated to have been made, "to wit at the said dwelling-house in which the said last mentioned child was so born as aforesaid, to wit at the parish" &c. The information requested was de-

1840.

The Queen
against
Parr.

1840.

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The QUEEN
against
PRICE.

scribed as in the second count. The count then substantially followed the third count, omitting the "force and arms."

Fifth count. "That the said *B. P.*, on the 16th day of *June* A.D. 1838, at the parish" &c., "being then and there the father of a child, born in *England* within forty-two days then next preceding, and born after the last day of *June* A.D. 1837, and born within a certain registrar's district for the registration of births and deaths, towit the *St. Peter's* district, being, at the time of the birth last aforesaid and ever since, such registrar's district as in this count mentioned, and situate in the said county of *Warwick*, did not nor would, upon being, as he was, towit then and there, and within forty-two days next after the day of the birth of the said last mentioned child, requested so to do by *G. B.*, then and thenceforth hitherto, towit there, being the registrar of births and deaths within and for the said last mentioned district, or at any time whatsoever, give to the said *G. B.*, so then and there, and thenceforth hitherto, being such registrar of the said last-mentioned district as aforesaid, or to any other person whatsoever, information according to the best of his, the said *B. P.*'s, knowledge and belief, or otherwise howsoever, of the particulars, or of any of them, required by an act, entitled" &c., "to be known and registered, touching the birth of the said last mentioned child: but the said *B. P.* then and there, always before and after, although often duly requested, wholly neglected and refused so to do, towit at the parish" &c. "And the jurors" &c. "that no other person ever did give such information as last aforesaid, or any part thereof, and that the said last mentioned period of forty two days next after the day of the birth of the said child last aforesaid elapsed and expired long before the time of taking this inquisition; and that the said *B. P.* was not, during any of the time in this count mentioned, prevented from giving the said last-mentioned information by illness, absence, or any inability whatsoever, but could and might, and ought to, have given the same, towit when he was requested as in this count mentioned; against the form" &c.

1840.

GRIFFIN *against* ELLIS and GOUGH.Monday,
February 3.

PROHIBITION. The declaration stated that, on divers days between 17th *October* 1833 and 1st *April* 1834, defendants, being the churchwardens of the parish of *Portsea* in *Hampshire*, of their own accord, but without the concurrence of the parishioners, incurred debts amounting &c., towit 150*l.*, in expenses alleged by them to be incident to the celebration of public worship &c. in the parish: that, on the day last mentioned, they were elected churchwardens for the ensuing year: that, on divers days between that day and 29th *October* 1834, of their own &c., without &c., they incurred another debt, to wit 100*l.* (described as before): that, on the day last mentioned, the vicar and churchwardens, with divers parishioners and inhabitants, assembled in vestry in the parish church, the vicar being chairman; and it was proposed that “a rate should be made for the purpose, among others, of discharging the said debts;” that an amendment was moved and seconded, to the effect that the vestry should adjourn to 22d *October* 1835, and was declared to be carried on a show of hands, whereupon a poll was demanded: that, although a proposition was duly moved and seconded for the purpose of regulating the time and place of taking the poll, the vicar refused to put it from the chair, “and then of his own mere authority, and without the sanction or consent of the said vestry meeting, adjourned the said meeting of the said vestry to another and a different place, towit to the vestry-room

By a declaration in prohibition to an ecclesiastical court in the matter of a church rate, plaintiff set forth matter which, as he contended, shewed the rate to be void, as being retrospective and irregularly made; he also set forth the proceedings of the ecclesiastical court, which consisted of a libel, a defensive allegation, and a responsive allegation, the last being received after objection by the now plaintiff in prohibition; and on these, as the plaintiff contended, the matter of objection appeared to be admitted in fact.

Held, that, on plaintiff's shewing, no case was raised for a prohibition at this stage of the proceedings.

1840.

 GRIFFIN
 against
 ELLIS.

of the said parish," to be held on days and hours by him then named, without the consent of the vestry: that divers, towit one hundred, persons were, towit on the days and times aforesaid, admitted by the vicar to vote at the poll, who had not been present at the vestry meeting: that plaintiff, at the time of the vestry meeting, was and still is an inhabitant and occupier in the parish; nevertheless defendants, contriving &c. the plaintiff, contrary to the law of the realm, to oppress &c., caused him to be cited to appear in the Court Christian before The Right Honourable Sir *Herbert Jenner*, Knight, LL.D., official principal of the Arches Court of *Canterbury*, or his surrogate, or some other competent judge thereof, of and for plaintiff's refusal to pay 7s. 6d. alleged to be assessed upon him in respect of a pretended rate alleged to have been made by defendants and certain other parishioners at the vestry meeting holden and adjourned as aforesaid, for the purpose of discharging the said debts; and, for the purpose aforesaid, libelled against plaintiff in the said court before the said spiritual judge, among other things, to the effect following.

The declaration then set out allegations of the libel, namely, that, on 29th *October* 1834, the minister and churchwardens, and divers inhabitants of the parish, met together in vestry to make a rate for and towards the payment of the necessary repairs of the parish church, and of the expenses of defendants, incidental to the expenses of their office, and, having so met, resolved that a rate should be made at 3d. in the pound; and that, in pursuance of such resolution, a rate was duly made and signed: that the plaintiff was duly assessed, towit in 7s. 6d., in respect of &c., occupied &c.;

&c.; that he refused to pay, and was summoned by defendants before two justices, who refused to enforce payment. The libel prayed that plaintiff might be condemned in the payment of the 7*s.* 6*d.*, and also in the costs made and to be made on behalf of defendants in the cause, and compelled to the due payment thereof by the definitive sentence of the said spiritual Judge. And defendants exhibited and annexed to the libel an alleged copy of the rate, which began, "We, the churchwardens and other parishioners of the parish" &c., "do hereby, this first day" &c., "at our vestry meeting for that purpose assembled, rate and tax all and every the inhabitants and parishioners of the parish aforesaid, hereinafter mentioned, for and towards the repairs of the church of the said parish for the present year, the several sums following, viz." &c. The rate was then set out, in which the plaintiff was assessed at 7*s.* 6*d.*; and at the foot of the assessments was written, "A poll having been demanded for this rate of 3*d.* in the pound, a majority of 446 was given in favour of it." Then followed the signatures of the vicar, curate, defendants, thirty three parishioners, and the vestry clerk, with the allowance and confirmation by the vicar general.

The declaration then stated that plaintiff, appearing in the said spiritual court, before &c., by way of allegation defensive, pleaded and alleged, amongst other things, that the levy of 400*l.* for which the said pretended rate was proposed on 29th *October* 1834, was not designed for, or intended to be, applied to the repair of the said church, or any other object for which a rate could be made validly and effectually in law, but that the same was asked for, and intended to be applied to, other purposes, and those to which a rate

1840.

 GRIFFIN
against
ELLIS.

1840.

GRIFFIN
against
ELLIS.

was not legally applicable; and that the same was, in greater part, intended to be applied in discharge of debts contracted by the churchwardens previous to 29th *October* 1834. That, at the meeting on 29th *October* 1834, the defendant *Gough*, then being one of the churchwardens, did publicly state to the meeting that the debts already incurred by the then late and present churchwardens amounted to about 250*l.*, and that the sum requisite to carry the churchwardens through the then ensuing year would be about 148*l.*, making altogether 400*l.*; and that, for the raising or levying of such sum, a rate was then proposed of 3*d.* in the pound, by which 400*l.*, or thereabouts, would be obtained. That, at the hearing before the justices, the defendant *Gough* admitted on oath that he had made a statement at the meeting on the said 29th *October*, to the effect that the said pretended rate was wanted in part for debts already incurred, and that the said pretended rate, in so far as the same had been collected, had been applied wholly, or in great part thereof, to the payment of the same. The defensive allegation then set out (as in the early part of the declaration, but more minutely) the proposal of the rate at the meeting of 29th *October* 1834, the amendment, its being carried by a shew of hands, the demand of a poll, the adjournment, and the poll; adding, that the original question as to the rate had never been put to the meeting. That the said pretended rate had been in part collected and applied towards the discharge of debts incurred previous to the said 29th *October*, some of the said debts being debts existing for above twelve months before, and to other purposes not sanctioned by law. Other matter was added, but was not insisted upon in argument.

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The declaration then stated that defendants, by their allegation responsive, alleged the holding of a vestry on 17th *October* 1833, for making a church rate, at which an adjournment to the first *Wednesday* in *October* 1834 was carried: that the churchwardens of the parish, being without funds for a year to enable them to fulfil the duties of their office, were obliged to, and did, incur certain debts on the credit of the parish, to the amount of about 250*l.*; that a statement of these debts was produced at a vestry meeting of 29th *October* 1834, and also a statement of the sum requisite to defray the expense incidental to the office of churchwardens for the current year. The allegation responsive then set forth, with some unimportant variations, the carrying of the amendment by the shew of hands, and the adjournment; that the poll commenced, with the concurrence of the mover and advocates of the proposed amendments (a); that the chairman declared a majority of 446 in favour of the rate; that no part of the sum to be raised, or in part raised, by the said church rate was ever designed to be, or had ever in fact been, applied to any other objects than those to which church rates are legally applicable; and that no part thereof was intended to be, or had been, expended in discharge of debts theretofore contracted by the parish, save to the extent and in manner contracted as thereinbefore particularly mentioned; and that such intended application of the said sum to be raised by the said church rate in part discharge of the same outstanding debts was expressly sanctioned by the majority of parishioners, who concurred in the making of the said rate.

(a) Including, apparently, the proposal to regulate the poll, which the vicar declined to put.

1840.

 GRIFFIN
 against
 ELLIS.

1840.

GRiffin
against
Ellis.

The declaration stated that the judge of the spiritual court admitted the allegation responsive, notwithstanding plaintiff insisted that it should be rejected; and that the said suit was still depending in the spiritual court.

Demurrer, assigning for causes (among others) the objections taken in the ensuing argument. Joinder.

The demurrer was argued in last *Trinity* term (a) and vacation.

Rogers for the defendants (b). No ground appears, on this record, for a prohibition. The object of a prohibition is to confine the Court to which the prohibition goes within its proper jurisdiction. In *Ayliffe's Parergon*, a work of authority, it is said (p. 171.), "The common law courts will not take cognizance whether the Ecclesiastical Courts observe their laws or not: prohibitions being only granted, when the common law is invaded or interfered withal." The origin of the writ of prohibition seems to have been this. After the separation of the civil and temporal courts, if there occurred in the temporal courts any question properly of ecclesiastical cognizance, as, for instance, touching marriage or bastardy, the judges of the temporal courts applied to the Ecclesiastical Court to certify what the law was. An instance occurred in *Jeffrey's Case* (c). That practice, though disused, illustrates the point. For the Ecclesiastical Courts were unable to obtain a like cer-

(a) June 5th and 20th, 1839. Before Lord Denman C. J., *Littledale, Patteson, and Williams* Js.

(b) The case of *Burder v. Veley*, decided in the term following (judgment affirmed by the Court of Exchequer Chamber in *Hilary* Vacation, 1841), was argued immediately before that in the text; and *Rogers* referred generally to the authorities there cited, as to the rules guiding the temporal courts upon applications for prohibition.

(c) 5 *Rep.* 66 b. See 67 b.

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ific ate, in questions properly of temporal jurisdiction, from the temporal courts, and were therefore compelled to consider such questions themselves: and, when this occurred, the temporal courts prohibited the Ecclesiastical Courts from adjudging on the temporal question. In *Hawk. Pl. Cr. b. 1. c. 2. s. 9. (a)* it is said, "if a man be proceeded against as an heretic in the spiritual court *pro salute animæ*, and think himself aggrieved, his proper remedy seems to be by appeal to a higher ecclesiastical court, and not to move for a *prohibition* from a temporal one, which, as it seems to be agreed, cannot regularly determine or discuss what shall be called heresy." In *Bunting v. Lepingwell (b)* it is said, "Forasmuch as the conusance of the right of marriage belongs to the Ecclesiastical Court, and the same court has given sentence in this case, the judges of our law ought (although it be against the reason of our law) to give faith and credit to their proceedings and sentences, and to think that their proceedings are consonant to the law of holy church, for *cuiuslibet in suâ arte perito est credendum*, and so have the judges of our law always done." In *Bull. N. P. p. 218.* three cases are mentioned in which prohibition is granted: "*pro defectu jurisdictionis*, *pro defectu triationis*, or for proceeding as the law of the land does not warrant." It is added (p. 219.), "As to the third cause for which prohibitions are grantable, the rule is, that where the ecclesiastical court proceeds in a matter merely spiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies; as in probate of wills if they refuse one witness; but if they have conusance of the original

1840.

 GRIFFIN
 against
 ELLIS.

(a) Vol. i. p. 7. (7th ed.).

(b) 4 Rep. 29 a.

matter,

1840.

GAFFIN
against
ELLIS.

matter, and an incident happen which is of temporal cognisance, or triable at common law, they must try it as the common law would; as in a suit for a legacy, if the defendant plead a release or payment, they must admit the evidence of one witness; but if they admit the proof, they are to judge whether he be credible or not; therefore if they determine against his evidence, the party has no remedy but by appeal." Here the main subject of the ecclesiastical suit is the church rate, which undoubtedly is matter of ecclesiastical cognizance. Then, how does the case for prohibition arise? The objection in the declaration appears to be pointed to the admission of the responsive allegation. Now, the responsive allegation merely states the circumstances under which the poll was taken, and denies that the funds to be raised by the rate were applied, or designed to be applied, to illegal purposes, or to debts, except as there explained; and it adds facts as to the concurrence of the mover and seconder of the amendment, and the assent of the parishioners. The ecclesiastical courts were bound to admit this, having admitted the defensive allegation which it answers. It is said that the rate, being retrospective, was void. Supposing that to be so, the question whether it was retrospective was for the ecclesiastical court; if it was retrospective, and that avoid it, this Court cannot assume that the ecclesiastical court will hold otherwise. On its face, the rate is not retrospective. It does, indeed, appear that some of the parishioners considered the rate to be retrospective: but can that alone make it void? If the rate were retrospective on its face, could any declaration of the parishioners, that the rate should not be applied retrospectively, cure the defect, supposing it to be one? Payments for illegal purposes would, in effect, come from

from the pockets of the parish officers: the objection might be made to the allowance of the accounts, and cannot be made otherwise, where the rate is made, professedly, for legal purposes only. If there was an intention to apply it illegally, that appears to have been abandoned. The churchwardens could not here have made a rate by themselves: how, then, can they have the power of rendering, by their declarations, the rate of the parishioners ineffectual, when made? In *Rex v. Sillifant* (a) Lord Denman C. J. said, "I believe we are all satisfied that there is nothing in the objection that the purposes of this rate are retrospective, the rate being correct on the face of it. That point could be raised only in objecting to the accounts." *Rex v. The Mayor, &c. of Gloucester* (b) is to the same effect. In *Chesterton v. Farlar* (c) an ecclesiastical suit, instituted for the nonpayment of a church rate, was carried up by appeal to the Privy Council. Before any proceedings had taken place there, the party libelled applied for a prohibition, on the ground that the pleadings in the ecclesiastical court shewed the rate to be bad. But this Court refused to interfere, because they could not presume that the Privy Council would decide wrong. There the objection was, as here, that the rate was retrospective; and the fact was admitted on the pleadings. So, in *Hall v. Maule* (d), where the pleadings in the ecclesiastical court shewed that that Court would have to decide on a statute, a prohibition was refused. Even if the ecclesiastical court have done wrong, the remedy is not by prohibition. In *Ex parte Smyth* (e) a prohibi-

1840.

 GRIFFIN
against
ELLIS.

(a) 4 A. & E. 354. See p. 361.

(b) 5 T. R. 346.

(c) 7 A. & E. 713.

(d) 7 A. & E. 721.

(e) 2 C. M. & R. 748.; S. C. Tyrwh. & Gr. 222.; and see *Ex parte Smyth*, 3 A. & E. 719. 724.

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1840.

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GRIFFIN
against
ELLIS.

tion to the Privy Council was moved for, on the ground that they had decided wrongly on a point of practice, in a case within their jurisdiction; but the Court of Exchequer refused, saying that there was no appeal from the Privy Council, and that, if there had been, the proper course would have been, not to apply for a prohibition, but to appeal. Here the plaintiff may appeal. [As to the validity of the rate, he cited *Towney's Case* (a), *Lanchester v. Frewer* (b), *Rex v. The Chapelwardens of Bradford* (c).]

Wightman, contra. The rate is void, both as being retrospective, and as being made on a poll improperly taken. The former is the principal objection. It appears, upon the pleadings in the ecclesiastical court, that the rate is for retrospective purposes: and the ecclesiastical court, after that appeared, has received the responsive allegation. They, therefore, are clearly going on with the cause. This brings the case within the principle of *Byerley v. Windus* (d), where a prohibition was granted, because it appeared that the spiritual court was "proceeding towards the trial of the prescription." That it is in conformity with the language in *Com. Dig. Prohibition*, (F 14.). In *Woodward's Case* (e) a prohibition was granted where a suit had been commenced in the ecclesiastical court against an occupier, not being an inhabitant, for a rate for the bells of the church. In *Rogers v. Davenant* (g) a suit had been commenced in the ecclesiastical court for a rate laid by a commission directed by the bishop to rate parishioners for reedifying churches;

(a) 2 *Ld. Raym.* 1009.(b) 2 *Bing.* 361.(c) 12 *East*, 556.(d) 5 *B. & C.* 1. See p. 21.(e) 3 *Mod.* 211.(g) 2 *Mod.* 8. (5th ed. 1793. In the folio, 1757, p. 8, the case is called *Curtis v. Davenant*.)

and

and at that stage a prohibition was granted. The statute *Circumspectè agatis*, 4 stat. 13 *Ed.* 1., directs the King's judges to use themselves circumspectly, "if prelates do punish for leaving the church-yard unclosed, or for that the church is uncovered, or not conveniently decked, in which cases none other penance can be enjoined but pecuniary;" and, "in all cases afore rehearsed, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition." This seems to be the only foundation of the ecclesiastical jurisdiction in questions of church rate, which, however, must now be taken to exist. The statute does not point out the method of laying the rate: the Court must, therefore, apply common law principles; and these are inconsistent with a retrospective rate, because by such a rate a party might be liable to contribute for expenses incurred before his occupation. Now, here, the rate is admitted to be retrospective. If the suit go on to sentence, the present plaintiff will be in a situation of greater difficulty. In *Home v. Earl Camden* (a) it was held that, to warrant a prohibition on the ground of misinterpretation of a statute, it should appear that the party applying has, in the proceedings in the Court below, alleged the grounds for a contrary interpretation, and that such Court has proceeded notwithstanding. Here that has been done. *Hall v. Maule* (b) is consistent with this, and with *Byerley v. Windus* (c). In *Hall v. Maule* (b) it did not appear that the Court was proceeding after illegality was shewn on the pleadings. The dictum cited from *Rex v. Sillifant* (d) was extrajudicial: the decision there was upon a distinct ground. In *Ches-*

1840.

 GRIFFIN
 against
 ELLIS.
(a) 2 *H. Bl.* 533. See p. 538.(c) 5 *B.* & *C.* 1.(b) 7 *A.* & *E.* 721.(d) 4 *A.* & *E.* 361.

1840.

 GRIFFIN
 against
 ELLIS.

terton v. Farlar (a), before the Privy Council, a rate which was good on the face of it was held bad because in fact retrospective. If the objection could not be taken till the accounts were to be passed, the party objecting would have to pay the money in the first instance, and would not recover it back. [*Patteson J.* The charges so disallowed would give so much in hand towards the next year.] But that might be of no use to the party objecting: he might have ceased to occupy, after making the payment. It is on account of this possibility that retrospective rates are holden to be bad. Therefore a rate, which is good upon its face, but in fact is intended to cover a bygone charge, must be objected to by application for a prohibition. If there remained a question whether in fact it was retrospective or not, that might be left to the ecclesiastical court: here the fact is admitted. [He then argued the general question as to the badness of a retrospective rate, citing, in addition to the cases already mentioned, *Lanchester v. Thompson (b)* and *Rex v. Goodcheap (c)*, and referring to stat. (U. K.) 41 G. 3. c. 23. s. 9.]

Rogers, in reply. *Chesterton v. Farlar (a)* was decided on appeal from the ecclesiastical court, which shews what the proper course is, if the objection be good. It is assumed that the ecclesiastical court, by admitting the responsive allegation, affirms the rate: but that is not so; the responsive allegation should be admitted, if, upon it, there be a possibility that the rate is good, according to *Dew v. Clark (d)*. The Court is justified in

(a) See 1 *Curt. Eccl. Rep.* 345. 367. 371. S. C., at a later stage, 2 *Curt. Eccl. Rep.* 77.

(b) 5 *Mod.* 4.

(c) 6 *T. R.* 159.

(d) 1 *Add. Eccl. Rep.* 279. See p. 283.

receiving

receiving an explanation of the facts alleged in the defensive allegation: all rates discharging previous liabilities are not bad. If the ecclesiastical court give a decision contrary to common law, there may be a prohibition after sentence (a). Prohibition lies if at any step the ecclesiastical court exceed its jurisdiction; *Leman v. Goult* (b). In *Rogers v. Davenant* (c) and *Woodward's Case* (d) the defect seems to have appeared on the face of the rate. In *Byerley v. Windus* (e) there was a direct traverse of a prescription, which the ecclesiastical court could not try.

1840.

 GRIFFIN
 against
 ELLIS.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

This was a declaration in prohibition to the Court of Arches, to prevent an enforcement of a church rate.

The proceedings in the Court Christian are set out, and shew a rate duly made in consequence of a vote of vestry, *October* 29th, 1834, by churchwardens, with assent of the parishioners, and good on the face of it. The plaintiffs in prohibition, sued in the Court Christian, put in a defensive allegation that the rate was designed to be applied to paying off debts previously incurred; in answer to which the churchwardens allege that, on the 17th of *October* 1833, a vestry was convened to consider of a church rate, the church requiring repair, and an estimate of the sum required laid before it, but the meeting was adjourned for a year, and no church rate

(a) See *Gare v. Gapper*, 3 *East*, 472; *Gould v. Gapper*, 5 *East*, 345.; *Ricketts v. Bodenham*, 4 *A. & E.* 433.

(b) 3 *T. R.* 3.

(c) 2 *Mod.* 8.

(d) 3 *Mod.* 211.

(e) 5 *B. & C.* 1.

granted,

1840.

GRIFFIN
against
ELLIS.

granted, whereby the churchwardens were obliged to incur debts; and, at a subsequent meeting, the vestry came to a resolution to impose the present rate in order to pay the debts so incurred, which were expressly sanctioned by the vestry. This responsive allegation the Court of Arches admitted.

Various points were made (a): 1. whether the *rate*, being in its form regular and lawful, was vitiated by *any* design to employ in any manner; for, if the employment of it should be unlawful, appeal might be made against the churchwardens' accounts; 2. whether this rate is bad, as being retrospective, under the peculiar circumstances of the case, the debt having been incurred by the neglect of the parish to vote a church rate when wanted, as was admitted by the vote of vestry afterwards, when the debt was expressly sanctioned; 3. whether, even if these defects should be held fatal, they entitled the plaintiff to his writ of prohibition, which assumes the Court Christian to have exceeded its jurisdiction, or were only grounds of appeal, the suit itself being matter of ecclesiastical cognizance, and the defence stated being such as that Court is able, and indeed bound, to give effect to, if valid in point of law.

On this last ground, on the authority of many cases, we think that the demurrer must prevail, and a consultation be awarded.

It has been often held that an erroneous judgment on matters within the cognizance of the Court Christian will not entitle to prohibition, but only to appeal. If, on appeal, their sentence should be of such a nature as to show a defect of jurisdiction on the face of the pro-

(a) It has not been thought necessary to report minutely the arguments upon the points which the Court did not decide.

ceedings, application to prohibit may then be made. In the mean time, we must presume that the Court Christian will correctly administer the law.

1840.

GRIFFIN
against
ELLIS.

The case of *Chesterton v. Farlar* (a), lately before the judicial committee of the Privy Council, cited for the purpose of proving this rate illegal, was decided by that Court as a superior spiritual court on appeal. And the case of *Brettell v. Wilnot* (b), on which *Chesterton v. Farlar* (a) was mainly founded, occurred also in the Court of Arches, on appeal from the Consistory Court of *London*.

Consultation awarded.

(a) See 1 *Curt. Eccl. Rep.* 345. 367. 371.

(b) 2 *Phill. Eccl. Rep. temp. Lee*, 548.

The QUEEN *against* The Corporation of
WARWICK.

Tuesday,
February 4th.

This case is reported, 10 *A. & E.* 386.

MEMORANDA.

IN this vacation the following gentlemen were appointed Her Majesty's counsel: *George James Turner*, of *Lincoln's Inn*, Esquire; *Robert Baynes Armstrong*, of the *Inner Temple*, Esquire, with precedence next after *Griffith Richards*, Esquire (see 10 *A. & E.* 2.); *David Dundas*, of the *Inner Temple*, Esquire; and *Richard Bethell*, of the *Middle Temple*, Esquire.

VOL. XI.

3 E

In

1840. In the same vacation *James Manning*, of *Lincoln's Inn*, Esquire, *John Halcomb*, and *William Fry Channell*, of the *Inner Temple*, Esquires, *William Shee*, of *Lincoln's Inn*, Esquire, and *Digby Cayley Wrangham*, of *Grays Inn*, Esquire, were called to the degree of the Coif, and gave rings with the motto, "*Honos nomenque manebunt.*"

And *John Adams*, *Thomas Andrews*, *Henry Storks*, *Ebenezer Ludlow*, *Charles Carpenter Bompas*, *Edward Goulburn*, and *Thomas Noon Talfourd*, Esquires, Serjeants at Law, received patents of precedence, entitling them, respectively, to hold the rank which had been conferred upon them by the warrant of His late Majesty King *William* the Fourth, of *April 25th*, 1834 (*a*); as to which see the decision of the Court of Common Pleas, *In the Matter of the Serjeants at Law* (*b*).

(*a*) 10 *Bing.* 571.

(*b*) 6 *New Ca.* 232. 235.

END OF HILARY VACATION.

C A S E S

ARGUED AND DETERMINED

IN THE

1840.

Court of QUEEN's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE
EXCHEQUER CHAMBER,

IN

Easter Term,

In the Third Year of the Reign of VICTORIA.

The Judges who usually sat in Banc in this Term were,

LORD DENMAN C. J.	PATTESON J.
LITLEDALE J.	COLERIDGE J.

Of the cases decided in the ensuing term and vacation, three (marked S.), are reported by Mr. *Smirke* ; *Culley v. Doc dem. Taylerson* by Mr. *Ellis* and Mr. *Smirke*.

ALLAN against GOMME and DARVELL.

THIS cause was tried before *Littledale J.*, at the *Buckinghamshire* Summer assizes, 1838, when a verdict was found for the plaintiff, leave being reserved

In trespass
quare clausum
fregit, it ap-
peared that *B.*,
being owner of
the locus in
quo, and also

1840.

ALLAN
against
GUMME.

of certain other land, with houses, and a stable, loft, and chaise-house, conveyed to *A.* a part of the premises, consisting of a house and land comprehending the locus in quo, reserving to himself, his heirs, &c., occupiers for the time being of a messuage (not conveyed; a right of

to move to enter a nonsuit. In *Michaelmas* term, 1838, *Storks* Serjt. obtained a rule nisi for a nonsuit, or for arresting the judgment.

In *Hilary* term last (*a*), *Kelly* and *Gunning* shewed cause, and *Storks* Serjt. and *Byles* supported the rule.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*May* 19th), delivered the judgment of the Court. The nature of the case, and the arguments used, will fully appear by the judgment.

This was an action of trespass for breaking and entering the plaintiff's close, being part of a certain yard at *Chesham*, in the county of *Buckingham*, which is

way and passage over the locus in quo to a stable and loft over the same, and the space or opening under the loft and then used as a woodhouse, and to the chaisehouse standing on the side of the locus in quo (the stable, loft, woodhouse, and chaisehouse not being conveyed), and also the use of the locus in quo in common with *A.*, his heirs, &c., and their tenants for the time being; it being expressed to be the intent of the parties that the whole of the yard comprehending the locus in quo should lie open and undivided, as the same then was, and be used in common by the occupiers of both messuages as the tenants thereof had been accustomed theretofore to use them.

Afterwards *B.* built a cottage on the site of the opening under the loft. Held,

1. That the reservation of the use of the locus in quo did not authorise *B.* to use it for the purpose of passing to the cottage.
2. That the reservation of the right of way was not limited to a right of passage to the space so long as it was used as a woodhouse; but gave a way generally to the space so described, while it was open.
3. But that *B.* was not entitled to use that way for the purpose of passing to a newly erected cottage on that space.

Defendant pleaded a justification, under the use of the right of passing to the stable, loft, and chaisehouse. Plaintiff new assigned, that defendant had converted the loft and opening into the cottage, and ceased to use it as a woodhouse, and passed to the cottage, and broke &c., for other purposes than in the plea mentioned. To which defendant pleaded that such passing was done for the purposes mentioned in the reservation, and as the tenants of the messuage not conveyed had been accustomed to use the locus in quo, without this, that defendant committed the trespasses newly assigned in manner &c. Held,

1. That the facts proved supported the new assignment.
2. That, even if the facts had justified the user described in the new assignment, defendant could not have had the verdict, inasmuch as the plea to the new assignment amounted only to Not guilty, and not to a justification.

(*a*) *Friday, January* 17th, 1840. Before Lord Denman C. J., *Littledale* and *Coleridge* Js. *Williams* J. was at *Monmouth*, on the special commission.

particularly

particularly described by the abuttals, and committing trespasses there. The defendants pleaded, 1. Not guilty. 2. That the close was not the close of the plaintiff. 3. That, before the times when &c., towit on the 5th *March* 1813, one *James Millar* and two other persons, as assignees of *Samuel Porter*, a bankrupt, were seized in fee of certain messuages, hereditaments, and premises, comprising, as well the hereditaments and premises thereafter mentioned to have been appointed and conveyed to the plaintiff, and of which the close in which &c. is parcel, as the hereditaments and premises thereafter mentioned to have been bargained and sold to the defendant *Gomme*; and that the said assignees and other persons, by lease and release of the 5th and 6th of *March* 1813, conveyed the whole of the premises in this plea mentioned to one *Browne* and his heirs (a); and, by indenture of appointment of 26th *October* 1826, between *Browne*, the plaintiff, and other persons, *Browne* directed, limited, and appointed to the plaintiff a certain messuage, hereditaments, and premises, being part and parcel of the messuage, hereditaments, and premises hereinbefore mentioned to have been conveyed to *Browne*, and comprising, among other things, the close in which &c.; reserving, nevertheless, to and for the said *Browne*, his heirs and assigns, and his and their tenants &c., occupiers for the time being of a certain messuage or tenement then in the occupation of one *Thomas Creed*, and thereafter mentioned to be bargained and sold to the defendant *Gomme* (the said last-

(a) The habendum was to the use of such persons as *Browne* should appoint by deed, writing, or will; and, in default &c., to the use of one *Woodham* for *Browne*'s life, in trust for *Browne* and his assigns, remainder to the use of *Browne* in fee.

1840.

 ALLAN
against
GOMME.

1840.

ALLAN
against
GOMME.

mentioned messuage or tenement being other parcel of the said messuages, hereditaments, and premises mentioned to have been bargained and sold to the said *Browne*), *a right of way and passage over the said close in which &c., to the stable and loft over the same, and the space or opening under the said loft and then used as a woodhouse, and to the chaisehouse then standing and being on the side of the said close in which &c. (the said stable, loft, and chaisehouse then also being in the occupation of the said Thomas Creed, and being other parcel of the premises thereafter mentioned to have been bargained and sold to the defendant Gomme, and also of the hereditaments and premises thereinbefore mentioned to have been bargained and sold to the said Browne); and also the use of the said close in which &c., in common with the plaintiff, his appointees, heirs, and assigns, and his and their tenants for the time being; it being expressed in the said last mentioned indenture to be the intent and meaning of the parties thereto that the whole of the said yard, of which the said close in which &c. was and is parcel, (except a certain part thereof other and different from the said close in which &c.) should lie open and undivided as the same then was, without any other building to be erected thereon, and that the same should be used in common by the occupiers, as well of the said messuage or tenement appointed by the said last mentioned indenture to the plaintiff, as of the said other messuage or tenement hereinafter mentioned to have been bargained and sold to the defendant Gomme, in the same manner as the tenants thereof had been accustomed theretofore to use the same. By virtue of which said indenture of appointment*

ment the plaintiff became and was and still is seised of and in the said close in which &c., subject to such right of way and to such use of the said close in which &c., as was and is reserved by the said last mentioned indenture of appointment. The plea then stated that, before and at the time of the making of the said indenture of appointment, and thence until and at the time of the making of the indenture hereinafter next mentioned, the tenants and occupiers of the said messuage and of the said stable, loft, and chaisehouse hereinafter mentioned to have been bargained and sold to the defendant *Gomme*, but at the time of the making of the said indenture of appointment in the occupation of the said *Thomas Creed*, and also the tenants and occupiers of the said messuage or tenement so appointed to the plaintiff, had been used and accustomed to use the said closes in which &c.; and the said close in which &c. during all the time aforesaid was open and undivided, and was used in common by the respective tenants and occupiers of the said several messuages, tenements, and premises for the purposes of passing and repassing in and along the same; and the said tenants and occupiers of the said messuage and premises hereinafter mentioned to have been bargained and sold to the defendant *Gomme*, during all that time, had been used and accustomed to use the said close in which &c., for themselves and their servants, for the passing and repassing in, along, and across the same every day and at all times of the day, at their free will and pleasure, for the necessary use, occupation, and enjoyment of the said messuage and premises hereinafter mentioned to have been conveyed to the defendant *Gomme*. The

1840.

 ALLAN
 against
 GOMME.

1840.

ALLAN
against
GOMME

plea then stated several conveyances of the premises not conveyed to the plaintiff by the deed of 26th of *October* 1826, and to which premises so not conveyed to the plaintiff the right of way and the use of the close so before mentioned had been reserved to *Browne* and his heirs, and by which conveyances these premises became vested in *Joseph Birch*, in trust for the defendant *Gomme*; and the defendant *Gomme*, by the licence and permission of the said *Birch*, became and was and still is in the occupation of the said last mentioned messuage and premises, with the appurtenances, as the tenant and occupier thereof, and, as such tenant and occupier, then became and was entitled to have and use a way over the said close in which &c., to the said stable and loft and chaisehouse standing and being on the side of the said close in which &c., in common with the plaintiff and his tenants for the time being of the said messuage and premises of the plaintiff. And the said defendant *Gomme* then became and was entitled to use the said close in which &c., in common with the said plaintiff, so being the occupier of the said messuage and premises of the plaintiff, in the same manner as the tenants of the said several messuages had been respectively accustomed to use and occupy the said close in which &c., at the time of making the said indenture so bearing date the 26th day of *October*, in the year of our Lord 1826, as aforesaid. Wherefore, the said defendant *Gomme* so being such occupier, and being so entitled as aforesaid, at the said several times when &c., and having occasion to use the said way, and also to use the said close in which &c., for himself and his servants, for the purpose of passing and repassing
in,

in, along, and across the same for the necessary use, occupation, and enjoyment of the said messuage and premises so in the occupation of the said *Gomme*, he the said *Gomme* in his own right, and the said *Joseph Darvell* as his servant and by his command, at the said several times when &c., did pass and repass from the said messuage so in the occupation of the said defendant *Gomme*, in, through, over, and along the said close in which &c., unto and into the said stable, loft, and chaisehouse, and so from thence back again unto and into the said close in which &c., and from thence unto and into the said last-mentioned messuage, using the said way there for the purpose and on the occasion last aforesaid; and did also use the said close in which &c. for the purpose of passing and repassing in, along, and across the same for the necessary use, occupation, and enjoyment of the said messuage and premises so in the occupation of the said defendant *Gomme*, as the tenants of the said last-mentioned messuage, before and at the time of the making of the said indenture so bearing date the 26th day of *October* 1826, had been accustomed to use the same, as they the defendants lawfully might for the cause aforesaid.

And the plaintiff joined issue on the first and second pleas of the defendants.

To the plea of the defendants by them lastly above pleaded, the plaintiff said that he brought this action and declared therein, not for the said supposed trespasses in the said last plea mentioned, but for the trespasses thereafter mentioned. And the plaintiff said that, after the said conveyance to the said plaintiff as aforesaid, and after the defendant *Gomme* became such occupier as aforesaid, and before any of the said times when

1840.

ALLAN
against
GOMME.

1840.

ALLAN
against
GOMME.

when &c., towit on the 1st *February* 1833, the said defendant *Gomme* converted the said loft, and the space thereunder before then used as a woodhouse as aforesaid, into a cottage; and, before and at the said times when &c., the said loft and space were kept so converted into such cottage; and, before and at the said times when &c., the said other defendant *Darvell*, by the sufferance and permission of the said defendant *Gomme*, used and occupied the said cottage, and lived and resided therein, and, during all those times, the defendants ceased to use the same as a loft or woodhouse as aforesaid. And the said plaintiff further said that the defendants broke and entered the said close in which &c. on other and different occasions than those in the last plea mentioned, and for other and different purposes than in that plea mentioned, towit by then and there passing and repassing across the said close in which &c., from and to the said cottage so occupied by the defendant *Darvell* as aforesaid, and then and there passed to and from the said cottage, across the said close in which &c., unto and into the said other part of the said common yard in the said last plea mentioned, and thence unto and into a certain common highway there, and so from thence back again unto and into the said other part of the said common yard, and over the said close in which &c., unto and into the said cottage, for the purposes of the occupation of the same as aforesaid, and not for the said purposes in the said reservation in the said last plea mentioned. And the plaintiff said that the defendants, on the said days and times when &c., with force and arms &c., broke and entered the said close in which &c., and with feet in walking trod down, trampled upon,

upon, consumed and spoiled the grass and herbage of the plaintiff there then growing, on other and different occasions, and for other and different purposes, than in the said last plea mentioned, in manner and form as he the said plaintiff hath above thereof complained against the defendants.

And the defendants, as to the said several alleged trespasses above newly assigned, said that the said passing and repassing across the said close in which &c., in the said new assignment mentioned, was done and committed by the defendants for the purposes mentioned in the said reservation in the said indenture bearing date the 26th day of *October* in the year of our Lord 1826, and in the manner and as the tenants of the said messuage and premises in the occupation of the said defendant *Gomme*, before and at the time of the making of the said last mentioned indenture, had been accustomed to use the said close in which &c., without this, that the defendants, or either of them, committed the said several trespasses above newly assigned, or any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof, by his said new assignment, complained against them; and of this the defendants put themselves upon the country &c. Upon which the plaintiff joined issue.

This cause was tried before our brother *Littledale* at *Buckingham*, at the Summer assizes in 1838.

It was proved that the defendant *Gomme* converted the loft and the space thereunder, before then used as a woodhouse, into a cottage, and that the other defendant *Darvell*, by the sufferance and permission of *Gomme*, used and occupied the cottage, and that the defendants
passed

1840.

ALLAN
against
GOMME.

1840.

ALLAN
against
GOMER.

passed and repassed across the close in which &c. to and from the cottage as stated in the new assignment.

The jury found a verdict for the plaintiff, with 1s. damages.

The judge gave my brother *Storks* leave to move to enter a nonsuit, which he did, and also moved in arrest of judgment.

The question is, whether, under the terms of the deed of 26th October 1826, the defendants were justified in going backwards and forwards to and from the cottage which was built upon the site of the space or opening under the loft and then used as a woodhouse, mentioned in that deed, there being no cottage in existence there at the time of the execution of the deed.

The defendants claimed the right on two grounds.

First, that there is a right of way reserved to *Browne*, and those claiming under him and the future owners, to and from the space or opening under the loft then used as a woodhouse; and that, such right being reserved in general terms, and without any restriction whatever, these future owners and tenants may use the way, not only to the mere site of the space or opening used as a woodhouse, but also to whatever is built upon that site. The second ground of claim is, that, by the terms of the deed, *Browne* and those claiming under him had a right to use the yard in common with the plaintiff and his tenants, and in the same manner as the tenants had been accustomed theretofore to use the same; and that they had a right to the use of the yard under that clause of the deed without any reference to the reservation of the way.

We will give our opinion on the latter ground of claim

claim first, as there is less difficulty in that than on the question on the reservation of the way.

The right to use the yard in question in common with the plaintiff and his tenants is confined to the use of it as it was at the time of the execution of the deed. But, when there was no cottage built on the site of the open space of ground used as a woodhouse, the use of the yard was very different from what it would be when a cottage was built upon it. For, when the cottage was built, a much greater number of persons, perhaps some with more horses and carts, would come upon it, and be very likely to obstruct or put to inconvenience the plaintiff and his tenants, and prevent them from having the same enjoyment of it as before. And we think that, as the use of the yard by the defendant and his tenants since building the cottage is greater and more extensive, and may be more inconvenient to the plaintiff and his tenants, than it was before the cottage was built, that clause of the deed will not give the right to the defendants which they contend for.

Next, as to the reservation of the way.

It may be a question, in the first place, whether this is a way to a woodhouse by the description of a woodhouse, or whether it is a way to the open space of ground, and the saying "now used as a woodhouse" was merely to ascertain what piece of open ground was meant, and where it was. And it was contended by the defendants that, whatever might be the construction of the deed, if it was a way to a woodhouse specifically, in which case it might be said that the way was limited to a woodhouse merely as such, and that therefore, if the woodhouse was converted into a cottage, the way was gone, yet that, if the woodhouse was merely mentioned
to

1840.

ALLAN
against
GOMME.

1840.

 ALLAN
against
 GOMME.

to ascertain and point out the locality of the open space of ground, it could not be intended that the construction of the deed could be to confine the way to a mere piece of open ground, and that it must be intended that the way was meant to apply to a right to go to the ground whatever was the use to which the ground was put, whether by building or by a deposit of loose articles, such as wood, coals, or any moveable property.

We think, as between these two different meanings, considered as with reference to this property, the way is to be taken to be to an open piece of ground generally; and that the words "now used as a woodhouse" are to be taken as merely ascertaining the place where the piece of open ground was, and which, of course, must be particularly ascertained, either by name or abutments, or by the use which was made of it.

There is no direct authority to shew whether, if the use of a place to and from which a way is by express words reserved or granted, be completely changed, the way can still be continued to be used.

It has been held that, if a man has a right of way to a close called *A*, he cannot justify using the way to go to *A* and from thence to another close of his own adjoining to *A*. Vide 1 *Rol. Abr.* 391 (a), *Howell v. King* (b), *Lawton v. Ward* (c). That, however, does not decide the question. The case of *Ballard v. Dyson* (d) was a way claimed by prescription for cattle; the evidence was of a carriage way; and the question was, whether that proved a drift way for cattle. It was

(a) *Chimin Private*, (A), pl. 3. See *Ellison v. Isles*, ante, p. 673. *Com. Dig. Chimin*, (D 5.), was cited against the rule. See *Heynsworth v. Bird*, *Trials per Pais*, 529. 8th ed.

(b) 1 *Mod.* 190. *Bull. N. P.* 74., and *Senhouse v. Christian*, 1 *T. R.* 560., were cited against the rule.

(c) 1 *Ld. Raym.* 75. *S. C.* 1 *Lutw.* 111.

(d) 1 *Taunt.* 279.

held

held by all the Court that a carriage way did not necessarily prove a right of way for cattle, but it was evidence for the jury to consider along with other evidence. The case however was decided on the effect of the evidence as to the user, and whether the jury had come to a correct conclusion. In delivering the judgment of the Court, Lord Chief Justice *Mansfield*, Mr. Justice *Heath*, and Mr. Justice *Lawrence*, were of opinion that the extent of the usage of a way is evidence only of a right commensurable with the user. Mr. Justice *Chambre*, however, was of opinion that it was not so limited.

In *Cowling v. Higginson (a)* the defendant pleaded, to an action of trespass, a right of way for horses, carts, waggons, and carriages. On the trial before Mr. Justice *Coleridge*, it was admitted that there was a right of way for farming purposes over the locus in quo; but the defendants wished to establish a right to cart coals. On a motion for a new trial, Lord *Abinger* seemed to be of the same opinion that the three Judges had expressed in *Ballard v. Dyson (b)*, and did not agree with the opinion of Mr. Justice *Chambre*. Mr. Baron *Parke*, however, was of opinion, according to that of Mr. Justice *Chambre*, that, if a party has time out of mind used a way for all the purposes he wanted, it would seem to him to give him a general right (c).

In the case of *Jackson v. Stacey (d)* Mr. Baron *Wood* held that the user of a way for agricultural purposes only was not sufficient to support a general right.

All these three cases, however, turned upon the evidence of usage, and were all cases for the jury upon the

1840.

 ALLAN
against
GOMME.

(a) 4 M. & W. 245.

(b) 1 Taunt. 279.

(c) See p. 252.

(d) Holt's N. P. C. 455.

usage.

1840.

ALLAN
against
GOMME.

usage. The present case does not, however, depend upon the mode of using the way, but upon the legal effect of the reservation. Upon that we are of opinion that, under the terms of this deed, the defendant is not entitled to have the right of way claimed, but that he is to be confined to the use of the way to a place which should be in the same predicament as it was at the time of the making the deed. We do not mean to say that he could only use it to make a deposit of wood there, for we consider the words "now used as a woodhouse" merely used for the ascertaining the locality and identity of the place called a space or opening under the loft; and we think he might have the benefit of the way to make a deposit of any articles, or use it in any way he pleased, provided it continued in the state of open ground. But we think he could only use it for purposes which were compatible with the ground being open, and that, if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed.

Suppose that this piece of ground, instead of being a small quantity, had been a field of many acres, and that *Browne* had sold off the part above mentioned to the plaintiff, reserving to himself this right of way to the land, calling it a field then in pasture, or in corn, and had subsequently filled the land with small cottages, or had built a factory, or established gas works: it surely never could be contended that it was the meaning of either of the parties to the deed that there should be a right of way over the yard to those buildings. The supposed intention of the parties cannot, indeed, be considered; and it can only be determined by the instrument itself what their intention was. In *Luttrell's*

Case

Case (a) the plaintiff declared that he was seised in fee of two old and ruinous fulling mills, and that, from time immemorial, a great part of the water of a certain rivulet ran from a certain place to the said mills; and that he afterwards pulled down those fulling mills, and in their place built two mills to grind corn; and that the water ran to the new mills till such a time; and the defendants diverted the water from his corn mills. The defendants pleaded Not guilty, and the plaintiff had judgment. Then the defendants brought a writ of error in the Exchequer Chamber; and it was objected that the plaintiff, by pulling down the old fulling mills and building new mills of another nature, had destroyed the prescription, and could not have the benefit of the water for his grist mills. But the judgment of the Court was affirmed; and the Court held that the prescription did extend to the new grist mills; for the mill is the substance, and the addition of grist or fulling are but to shew the nature of the mill. And, therefore, if the plaintiff had prescribed to have the watercourse to his mill generally, as he well might, then the case would be without question but that he might alter the mill into what nature of a mill he pleased, provided no prejudice should thereby arise either by diverting or stopping the water as it was before. And it should be intended that the grant to have the watercourse was before the building of the mills; for nobody will build a new mill before he is sure to have water; and then, the grant of the watercourse being generally to his mill, he may alter the quality of the mill at his pleasure. And the Court said that, if a man has estovers, either by grant or prescrip-

1840.

 ALLAN
 against
 GOMME.

(a) 4 Rep. 86 a.

1840.

ALLAN
against
GOMME.

tion, to his house, although he alters the rooms and chambers so as to make a parlour where it was the hall or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys, by which no prejudice arises to the owner of the wood, it is not any disturbance of the prescription; for then many prescriptions will be destroyed; and, though he builds new chimneys, or makes a new addition to his old house, by that he shall not lose his prescription: but he cannot spend or employ any of his estovers in the new chimneys, or the part newly added; the same also of conduits and water pipes, and the like. So, if a man has an old window to his hall, and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such a part of the house. And, although in this case the plaintiff has made a question, forasmuch as he has not prescribed to have the watercourse to his mill generally, but particularly to his fulling mill, yet, inasmuch as the mill was the substance, and the addition demonstrates only the quality, and the addition was not of the substance but only of the quality or name of the mill, without prejudice in the watercourse to the owner thereof, it was resolved that the prescription remained.

The Court, therefore, appears to have put the case on whether the alteration of the thing, in respect of which the right was claimed, was of the substance and not merely of the quality of the thing. Now the alteration of a piece of vacant ground into a cottage is certainly an alteration of the substance, and not merely of the quality.

A great

A great number of cases have occurred of late years, as to lights, where there has been an alteration in the building in respect of which the lights were claimed; and, in some of them, the question has been, whether the original right has not been altogether extinguished by the alteration. We do not think it necessary to advert to the particular circumstances of the cases: but in none of them was it contended that, if the substance of the thing in respect of which the right was claimed was altered so as to occasion any injury or prejudice to the person who supplied the easement, any additional right of easement could be acquired. We think therefore that the defendants had no right, to use the way to the newly erected cottage, and that therefore there is no ground to enter a nonsuit.

As to the motion in arrest of judgment upon the new assignment, it is made upon the ground that the replication is no answer to the plea, and that the new assignment is only in respect of trespasses which on the record appear to be justified by the plea.

As to the replication being no answer to the plea, it is not in fact a replication properly so called; but it is a new assignment: and it begins with stating that the plaintiff brought his action, not for the trespasses mentioned in the plea, but for the trespasses thereafter mentioned; and then it goes on to enumerate other trespasses, and the circumstances under which they were committed. And we think that the plea, for the reasons we have before given, affords no answer to them, and that therefore there is no ground for arresting the judgment.

But besides, the merits of the cause being against the defendants on this point, the defendants could not, even

1840.

 ALLAN
against
 GOMME.

1840.

ALLAN
against
GOMME.

in point of form, have the judgment arrested, as the record now stands: for at the end of the new assignment there is a general allegation, independent of the question about the way or the use of the yard, that the defendants committed the trespasses on other occasions, and for other purposes than those mentioned in the plea, to which no answer is given in any part of the record, except the traverse at the end of the plea to the new assignment, which is in effect only Not guilty.

The rule, therefore, for entering a nonsuit, and also for arresting the judgment, must be discharged.

Rule discharged.

1840.

ATKINS *against* KILBY and WYATT.

TRESPASS for assaulting and imprisoning plaintiff, and forcing him to go in custody from *Torquay* in *Devonshire*, through and along certain public highways, to *Salisbury*, *Southampton*, and *Bishop's Waltham*, and from thence to a certain house of correction at *Winchester*, and there imprisoning and detaining him without probable cause, till he was forced to pay the keeper of the said house of correction 18*l.* 5*s.* to obtain his discharge: whereby plaintiff was put to expense, injured in his credit, &c. Plea, Not guilty. On the trial, before *Parke B.*, at the *Exeter* Summer assizes, 1838, the following facts appeared.

By warrant of a justice of *Hampshire*, directed to the constable of *Bishop's Waltham, Hants*, and to the keeper of the House of Correction at *Winchester*, bearing date

In an action of false imprisonment against constables who had carried plaintiff to goal on a justice's warrant for non-payment of arrears on an order of maintenance (stat. 49 *G. 3. c. 68. s. 3.*), it was objected,

1. That the warrant, though purporting to be made on a hearing at which plaintiff was present, had not been made then, but suspended for a month after (to give plaintiff an opportunity of consulting his

friends); and that it was issued at the end of the month, on plaintiff's default after fresh demand, without further hearing, and when plaintiff was in a different county from that in which the justice acted.

2. The warrant being indorsed by a justice of the county in which plaintiff was; that the indorsement did not purport to be made upon such proof on oath as stat. 24 *G. 2. c. 55. s. 1.* requires; nor was it shewn by evidence that such proof had been given.

Quere, whether these were valid objections. But

Held that, at all events, they resolved themselves into a denial of jurisdiction, and that the warrant, though made without jurisdiction, entitled the constables to the benefit of stat. 24 *G. 2. c. 44. s. 6.*

On demand, by plaintiff's agent, of a perusal and copy of the warrant, defendants gave a copy, and said that the original was in the hands of the gaoler; the agent said he knew that, and made no objection to the tender of a copy. The gaoler in fact always kept such warrants. Held a sufficient compliance with the demand, under stat. 24 *G. 2. c. 44. s. 6.*

The warrant required the constable forthwith to take plaintiff to the house of correction at *W.*, and there deliver him to the keeper, who was to keep him to hard labour for three months, unless he should sooner pay the maintenance to the overseers. Plaintiff tendered the arrears to the constable at *T.*, where he was arrested, and to the overseers of *B.* (the complaining parish), at *B.*, to which place he was taken on his way to *W.* Held, that the constable and overseer were not authorised to accept such tender.

B. was eighteen miles out of the direct road to *W.*, and plaintiff desired to be taken by the direct road. The Judge, in summing up, left it to the jury to say whether the route by *B.*, though circuitous, was the most convenient; and they found that it was. Held, that the summing up was proper, and that the finding entitled defendants to a verdict; it not having appeared by the evidence that plaintiff had in fact been put to any unnecessary inconvenience.

1840.

ATKINS
against
KILBY.

August 21st, 1836, and made on the oath of an overseer of the poor of Bishop's Waltham, it was recited that plaintiff had been, by two justices, adjudged the father of a bastard child lately born in the said parish, and had been ordered by them to pay the overseers 2s. 6d. weekly, towards the maintenance of the said child so long as it should be chargeable; that default had been made in payment, whereby there was due from plaintiff to the overseers 18l. 5s., which had been demanded of him and not paid: and that, plaintiff being present before the justice to answer &c., it appeared to the justice, on the oath &c., that 18l. 5s. was then due &c., and plaintiff refused to pay, and shewed no sufficient cause &c. The warrant then proceeded: "These are therefore to charge and command you the said constable forthwith to take and convey the said Frederick Atkins to the house of correction at Winchester in the county of Southampton aforesaid, and there deliver him to the keeper thereof together with this warrant. And I do hereby also command you the said keeper to receive the said F. A. into your custody in the said house of correction, and him there safely to keep to hard labour for the space of three months, unless he the said F. A. shall, before the expiration of the said three months, pay or cause to be paid to one of the overseers of the poor of the said parish of Bishop's Waltham, on whose behalf the aforesaid complaint has been made, the sum of 18l. 5s. so due and unpaid as aforesaid. Given" &c. The warrant was indorsed by a magistrate of the county of Devon, as follows. "County of Devon towit. I hereby authorise the within named constable of Bishop's Waltham to execute this warrant in the county of Devon, and also Charles Kilby, constable of Tormoham" (Devon), "to assist in executing the same. J. Garrow."

The

The plaintiff had appeared before a bench of justices in *Hampshire* to answer for his default of payment, as above mentioned, in *July* 1836, and the justices, on that occasion, gave him time to consult his friends, and said they would suspend their warrant for a month. Plaintiff then went to *Torquay*, in *Devonshire*, and remained there till the ensuing month, when, the money having been again demanded of him, but not paid, the warrant of a justice was issued without further proceeding. The above named *Charles Kilby* (one of the defendants) arrested plaintiff under the warrant, indorsed as above stated, at *Torquay*, conveyed him to *Bishop's Waltham*, in *Hampshire*, and there delivered him into the custody of defendant *Wyatt*, the constable of that place. *Bishop's Waltham* was not the nearest way to *Winchester*, by eighteen miles; and the plaintiff objected to that route being taken. Plaintiff, before leaving *Torquay*, tendered the 18*l.* 5*s.* to *Kilby*; but he refused to accept it. At *Bishop's Waltham*, plaintiff, in the presence of *Wyatt*, tendered the 18*l.* 5*s.* to the overseer of that place; but *Wyatt* said it could not be received, because the officers would not be allowed the expences of bringing the plaintiff from *Devonshire* till he was lodged in gaol. He was then taken to the House of Correction at *Winchester*, and placed in custody, after which he immediately paid the 18*l.* 5*s.*, and was discharged. Before bringing this action, plaintiff, by an agent, demanded of both defendants a perusal and copy of the warrant and indorsement. *Kilby* said he could not produce the warrant; but *Wyatt* gave a copy, saying the original was with the keeper of the House of Correction at *Winchester*. The agent who made the demand said he knew that: and the keeper stated, at the trial, that it was his duty to keep the

1840.

 ATKINS
 against
 KILBY.

1840.

ATKINS
against
KILBY.

original warrant for his justification, and that he always kept such original. Plaintiff's agent did not object to its non-production; and a copy of the copy was taken by plaintiff's attorney.

The plaintiff's counsel objected, first, that the warrant was not legally issued according to stat. 49 G. 3. c. 68. s. 3., by the justice of *Hampshire*, the plaintiff being absent, and in a different county, the hearing upon which the warrant was grounded having taken place a month back, and before the demand and default which immediately led to the issuing of the warrant, and these having occurred in *Devonshire*. Parke B. reserved the points. Secondly, that the indorsement ought to have been made, according to stat. 24 G. 2. c. 55. s. 1., on proof upon oath of the hand-writing of the justice granting such warrant, and that the indorsement itself ought to have averred such proof (to which point *Wilkins v. Wright (a)* was cited): but that no such proof was averred, nor was there any evidence that it had been given. Parke B. thought that he must presume the magistrate to have acted rightly, and on the requisite proof; but he reserved this point also. Thirdly, that the defendants had not entitled themselves to the benefit of stat. 24 G. 2. c. 44. s. 6., by shewing the warrant and permitting a copy thereof to be taken, as that clause requires. This point also was reserved. It was further contended, for the plaintiff, that, even if lawfully apprehended, he was entitled to damages for the detention after his tendering the money at *Torquay*; or at least after the tender at *Bishop's Waltham*: but the learned Judge, in his summing up, expressed a contrary opinion. And he left it to the jury to say whether the defendants had done their duty under the warrant;

(a) 2 Cro. & M. 191. S. C. 3 Tyr. 824.

desiring

desiring the jury to give damages prospectively for the whole imprisonment in case the Court should think it not justified; and also to say what damages were due to plaintiff for the deviation by *Bishop's Waltham*, if that was a circuitous and not the most convenient route. The plaintiff's counsel requested the learned Judge to direct the jury that the road taken was proved to be circuitous, and that the defendants were bound to take the shortest road, unless it could be proved, on their part, that the other was the most convenient, which, as he contended, they had not proved. The learned Judge declined so to leave it. The jury found that the road by *Bishop's Waltham* was the most convenient, and assessed the prospective damages at 5*l*. A verdict was taken for the defendants, and leave given to move to enter a verdict for the plaintiff. *Crowder*, in *Michaelmas* term 1838, moved, on the points reserved, to enter such verdict; he also moved for a new trial on the ground of misdirection as to the tender (citing *Robson v. Spearman* (a)) and as to the deviation. A rule nisi was granted on all the points but the last. In *Hilary* term 1840 (b),

1840.

 ATKINS
against
KILBY.

Erle and *C. Saunders* shewed cause. (The judgment of the Court renders it unnecessary to report the arguments on the reserved points.) Stat. 24 G. 2. c. 44. s. 6. was sufficiently complied with. The constable had not, by law, the custody of the warrant. On the demand, he produced a copy and referred to the legal custody for the original. And no objection was made on the plaintiff's part. At all events, it cannot be said

(a) 3 B. & Ald. 493.

(b) January 18th. Before Lord Denman C. J., Littleale, and Coleridge Js.

that

1840.

ATKINS
against
KILBY.

that the giving a perusal and copy has, in the words of the statute, "been refused or neglected," which implies something wilfully done. Then as to the tender: the warrant was imperative, requiring the constables forthwith to take and convey the plaintiff to the House of Correction, and there deliver him to the keeper, who was to receive him into the said House, and there keep him to hard labour for three months unless he should sooner pay &c. The constables had no discretion to exercise; they had no right to receive the money and discharge the plaintiff; nor could the overseer do so. The inconvenience resulting to the plaintiff arose from his own original default. The constables, therefore, have strictly obeyed the warrant, and were entitled to a verdict, the justice not being made a defendant.

Crowder and Butt, contra. Supposing that a tender to the constable at *Torquay* was not sufficient, at least the money should have been received when offered to the overseer at *Bishop's Waltham*. It cannot have been intended by stat. 49 G. 3. c. 68. s. 3. that a party should actually be confined in gaol, though ready to pay the arrears of maintenance. *Robson v. Spearman* (a) shews that an option was intended. After the plaintiff was imprisoned, the overseer was the proper person to receive the money; and he might have received it before. The plaintiff was virtually in prison from the time when he was arrested; for, if he was three days on the journey, the three months' imprisonment could not be reckoned exclusively of that time. It was not necessary, therefore, that he should be actually within the

(a) 3 B. & Ald. 493.

prison walls before a tender could be accepted. Supposing that the constables could not obtain their mileage without carrying the party to prison, that consideration ought not to weigh against liberty, if an earlier discharge is authorised by law. The rejection of the tender was a wrong for which no action could have been brought against the magistrates; and, as they could not have been joined, stat. 24 G. 2. c. 44. s. 6. does not apply; *Sturch v. Clarke (a)*. But, supposing that to be otherwise, the defendants here did not comply with the statute as to a perusal and copy of the warrant. The clause in question gives an advantage to constables which they had not at common law; they must take it with the conditions, and fulfil them strictly. If, on the demand of a perusal and copy, "compliance therewith" is out of their power, the plaintiff must not lose his common law remedy. The statute allows six days after demand, for obtaining the warrant. No instance has been cited in which less than a literal compliance has been held sufficient.

1840.

 ATKINS
 against
 KILBY.

Cur. adv. vult.

Lord DENMAN C. J. in this term (*May 13th*), delivered the judgment of the Court.

This was an action for assault and false imprisonment at *Torquay, Salisbury*, and other places, ending with the house of correction at *Winchester*, obliging plaintiff to pay 18*l.* 5*s.*, and forcing him to incur expenses. The plea was Not Guilty. The trial was before our Brother *Parke* at *Exeter*; and, a verdict having passed for the defendants, a motion was made to have it entered for

(a) 4 B. & Ad. 113.

the

1840.

ATKINS
against
KILBY.

the plaintiff for 5*l.* on some points reserved, or for a new trial. The cause of action arose out of the apprehension of the plaintiff at *Torquay*, on a warrant granted by two magistrates, for nonpayment of money alleged to be due under an order of filiation; the refusal to accept the money claimed until the plaintiff had been lodged in the house of correction; and carrying him thither by a circuitous route.

Several objections were made on the part of the plaintiff, which went to the validity both of the original warrant and of the indorsement thereon. Upon these, however, it is unnecessary for us to express any opinion, as they all resolve themselves, even if well founded, into a want of jurisdiction in the magistrates granting and indorsing the warrant, which will not the less avail to the protection of the defendants, who were constables, if they acted in obedience to it, and complied with a demand of perusal and copy of it duly made before action brought. For the statute 24 G. 2. c. 24. s. 6. expressly extends to cases in which the justices have acted without jurisdiction; and Lord *Eldon*, in his judgment in *Price v. Messenger (a)*, says that the law has provided that the remedy of the party grieved shall be confined to the magistrate, as well where he has granted the warrant *without having jurisdiction*, as where the warrant which he has granted is improper.

Now, with respect to the demand of a perusal and copy of the warrant, no question was made but that a copy was duly given; but, upon a demand for the perusal of the warrant itself being made, it was answered that the original could not be produced, for it

(a) 2 B. & P. 158.

had been taken by the keeper of the bridewell at *Winchester*; and he, being called, proved that he always took and kept the warrant when a prisoner was brought to his custody, and that he had done so in the instance in question. It was further admitted, by the witness who made the demand on the part of the plaintiff, that upon his receiving this answer he made no objection to the non-production, and that he was aware that the original was with the keeper of the bridewell as stated by the defendants.

The statute, therefore, was not literally complied with: but we think that under the circumstances a literal compliance must be taken to have been dispensed with. The demand of a perusal of the warrant was made by the agent of the plaintiff; and his conduct was such as to lead to the belief that the delivery of a copy under the circumstances was all that was required. But for this, steps might have been taken to procure the original: and the plaintiff cannot therefore rely on its non-production to oust the defendants of the protection of the statute.

The only remaining question is, whether the defendants acted in obedience to the warrant. Now that required them to convey the plaintiff to the *Bridewell*, and there deliver him to the keeper thereof: they had no authority to discharge the plaintiff or to receive the money at any intervening place: and the only doubt upon this part of the case could properly be, whether they had conveyed him by a circuitous route, and thereby subjected him to unnecessary inconvenience or exposure. The jury however have found that they carried him by the most convenient road; and we see no reason for disturbing their verdict. It follows, therefore,

1840.

ATKINS
against
KILBY.

1840.

ATKINS
against
KILBY.

therefore, that the defendants are well protected by the warrant, and that the verdict was properly directed to be entered for them.

The rule therefore will be discharged.

Rule discharged.

Wednesday,
April 15th.

DOE on the demise of CUTHBERT *against*
BAMFORD.

In ejectment brought by an assignee of a mortgage, made by the defendant, a party who has taken a later mortgage from defendant is not a competent witness for the defence.

EJECTMENT for lands in *Surrey*. On the trial before Lord Abinger C. B., at the last *Surrey* assizes, it appeared that the defendant, being possessed of a term of forty six years (still unexpired), mortgaged it to one *Cockburn* in 1836; that *Cockburn*, in 1839, in pursuance of a power of sale in the mortgage deed, assigned the term to the lessor of the plaintiff, who claimed, in the present action, under the assignment. The defence was that the assignment from *Cockburn* to the lessor of the plaintiff was merely colourable, and made for the purpose of evading a defence which the defendant would have had against *Cockburn*. In support of his case, the defendant called one *Hammond* as a witness, who, on the *voire dire*, stated that the land had been mortgaged to him by the defendant in 1837, after the mortgage to *Cockburn*. The Lord Chief Baron thought the witness incompetent, and he was rejected. Verdict for the plaintiff.

Platt now moved for a new trial (a). The witness was neither directly interested in the result of the action, nor would the verdict be evidence for him. The

(a) Before Lord Denman C. J., Patteson and Coleridge Js.

cases are collected in *Doe dem. Bath v. Clarke* (a). [Lord Denman C. J. If the action succeeded, the first mortgage might be enforced against *Hammond* by the lessor of the plaintiff.] That could be done only by establishing the validity of the assignment to the lessor of the plaintiff. The same question would then arise as in the present action; but the verdict in this action would not be evidence between the lessor of the plaintiff and *Hammond*. Nor would *Hammond* be benefited by the failure of this ejectment: the mortgage to *Cockburn*, if good, might be enforced against *Hammond* by *Cockburn* as well as by the lessor of the plaintiff. [Lord Denman C. J. Has not *Hammond* an interest in preserving *Bamford's* possession, since *Bamford* could not resist *Hammond's* title under the second mortgage?] *Hammond's* title is equally good, whoever is in actual possession. There might be a greater facility in enforcing the right in one case than in the other: but a mere difference of convenience does not create a disqualifying interest.

Cur. adv. vult.

LORD DENMAN C. J., on a subsequent day (*April 28th*), delivered the judgment of the Court.

This was an ejectment by mortgagee against mortgagor. The defendant called as a witness a second mortgagee, to shew the first mortgage void on account of fraud. He was rejected as incompetent.

If this action succeeds, there will be a change of possession; and the witness will not be able to recover against the new possessor without proving what he him-

1840.

DOE dem.
CUTBERT
against
BAMFORD.

(a) 3 *New Ca.* 429.

1840.

DOX dem.
CUTHBERT
against
BAMFORD.

self comes to prove here: whereas, if the action fails, he will be entitled to possession at once, since the defendant cannot resist him.

In *Doe dem. Bath v. Clarke (a)* it was held that the son of an elder brother (who was dead) of the lessor of the plaintiff might be called for the defendant, who was not in the situation of tenant at all, but claimed as devisee; *Tindal C. J.* and the Court intimating that, if the defendant had been tenant to the witness, it would be otherwise.

Here the witness is therefore interested in the event of the suit itself, and was properly rejected.

Rule refused.

(a) 3 *New Ca.* 429.

Wednesday,
April 22d.

PARKER against MITCHELL, FOSTER, GREENWOOD, and REDMAN.

A plea of forty or twenty years' user, under stat. 2 & 3 W. 4. c. 71. ss. 2, 4., is not supported by proof of user from a period of fifty years before the commencement of the action down to within four years of it; and, if the evidence go no farther, there is no case for the jury.

Per *Patteson*

and *Coleridge Js.* On issue upon a claim of way in right of occupation of the messuage and land of *G.*, the occupier of a part of the house occupied by *G.* is not a competent witness to support the affirmative, though his part of the house have no communication with the part which *G.* occupies.

TRESPASS quare clausum fregit. Plea 2. That defendant *Greenwood*, at the time when &c., was occupier of a farm called *Stone Booth*, containing a messuage and divers, towit 100, acres of land, and that *Greenwood*, and all the occupiers for the time being of the said farm, have, and each of them hath, had, used, and enjoyed, as of right, and have and each of them hath been accustomed to have, use, and enjoy, as of right, for and during the full period of forty years next before the commencement of this suit, a certain way for himself and themselves, and his and their servants, to

go &c. (describing the route), for the purpose of cutting turves in a common called *Wadsworth Common*, to be consumed on the farm: justification under the right of way. Plea 3. A similar plea, claiming the user for twenty years. The replication traversed the rights so claimed: and issue was joined upon those traverses. There were also other issues, some of which raised a similar question, and others are immaterial here.

1840.

PARKER
against
MITCHELL.

On the trial before *Coleridge J.*, at the last *York* assizes, the defendant gave evidence of user from a period of fifty years from the commencement of the suit, and so downwards till within four or five years from such commencement. No evidence having been given of the user within the said four or five years, the learned Judge was of opinion that the defendant's pleas above set out were not supported. A witness was called by defendant to prove the user antecedent to the last four or five years: but, on its appearing that he at present occupied part of the messuage mentioned in the pleas, though separated from the part occupied by *Greenwood* by a wall, through which there had been an opening into *Greenwood's* part, recently closed up, it was objected that he was incompetent; and the learned Judge held him to be inadmissible. The jury, under his Lordship's direction, found a verdict for the plaintiff on all the issues, the evidence on the user not being left to them.

Alexander now moved for a new trial on the ground of misdirection and rejection of evidence. First, it was not necessary, under stat. 2 & 3 *W. 4. c. 71. ss. 2, 4.*,
 Vol. XI. 3 G to

1840.

 PARKER
 against
 MITCHELL.

to prove the acts of user precisely down to the commencement of the action: the jury need not presume that the user, once proved to exist, had been discontinued. *Payne v. Shedden* (a) shews that a suspension or variation of the way, by agreement, does not defeat the plea. [Coleridge J. There you do not call upon the jury to make any presumption. If the continuation of user of a right of way after the time at which actual user was proved might be presumed, why might not the jury presume an user antecedent to the actual user proved? Yet this cannot be done (b).] That is because sect. 6 expressly provides that a presumption shall not be made in favour of the statutable claim on proof of enjoyment for a period less than the number of years mentioned. But here the proof did go sufficiently far back; and the question is, whether that be not proof of a continuing user in default of proof of cesser. [Lord Denman C. J. But how can you say that you have proved an enjoyment for the forty years? Would it be enough to prove that you had the user so late down as thirty nine years ago, without proof of user since then?] On the other hand, would not user down to a period within two days before the commencement of the action prove the plea? [Lord Denman C. J. That is a period less than a year. Here you have, in fact, an absence of proof for four or five years.] That could, at most, only lessen the strength of the evidence in the judgment of the jury. A party may not have occasion to pass over the way: but, if he once had the user, it does not cease at every instant in which the user is not going on. Secondly, the witness was

(a) 1 M. & Rob. 382.

(b) See *Bailey v. Appleyard*, 8 A. & E. 161., and note, p. i., in the same volume.

not interested in the event of the suit (a). He could not use the verdict. Indeed, he cannot be said to have occupied either the land or the messuage constituting the farm in right of which the way is claimed. The way is claimed in right only of the farm occupied by *Greenwood*. [*Coleridge J.* I admitted evidence of the acts of a former occupier of the part afterwards occupied by the person whom you proposed to call. The same principle which made the acts of the former occupier evidence appeared to me to require the exclusion of the present occupier. Lord *Denman C. J.* Did you propose that an indorsement should be made on the record?] No. [Lord *Denman C. J.* This question is really immaterial; for the evidence tendered would still leave the plea unproved as to the last four or five years. *Patteson J.* I think the witness was as much interested as tenants of a manor are to prove a manorial custom: and they are incompetent on an issue joined on such custom (b).]

1840.

 PARKER
 against
 MITCHELL.

Per Curiam (c),

Rule refused (d).

(a) See *Adeane v. Mortlock*, 5 New Ca. 236.

(b) See *Buller J.* in *Walton v. Shelley*, 1 T. R. 296. 302.

(c) Lord *Denman C. J.*, *Littledale, Patteson, and Coleridge Js.*

(d) See *Flight v. Thomas*, p. 688. *antè*.

1840.

Wednesday,
April 22d.DOE on the demise of THOMAS FRANKIS *against*
JONATHAN FRANKIS.

Plaintiff is
ejectment
having adduced
oral evidence
of the terms of
defendant's
tenancy under
him, defendant
put in the fol-
lowing memo-
randum, signed
by himself:

" July 13,
1838. I ac-
knowledge that
I have held the
estate " &c.,
" as tenant to
T. F." (the
plaintiff), " at
a yearly rent of
60*l.*, from 4th
July 1837, the
rent to be paid
quarterly; and
I further ac-
knowledge to
stand indebted
to the said T. F.
in 60*l.* for the
first year's rent,
which was due
on 4th July
instant. I have,
on the signing
hereof, paid the
attorney of
T. F. 6*d.* in
part of the rent
so due."

Held, that
this paper was
not a mere ac-
knowledgement
or attornment,
but a contract
or evidence of
a contract
within stat. 35 G. 3. c. 184. sched. Part I. tit. *Agreement*, and inadmissible without a
stamp.

EJECTMENT for messuages, &c., in the county of
Gloucester. On the trial, before *Patteson J.*, at the
last Spring assizes for *Gloucestershire*, a witness for the
plaintiff stated that the defendant had held the premises
as yearly tenant to his brother, *Thomas*, from *Michaelmas*
to *Michaelmas*, and had received a notice to quit at *Mi-
chaelmas*. The witness stated that no written agreement
was ever signed. But the defendant's counsel offered
in evidence a written paper, produced, on notice, by the
plaintiff's attorney, in the following words.

" 1838. July 13. I hereby acknowledge that I have
held the estate called *Cudhill*, situate in the parish " &c.,
" consisting of a dwelling house and premises, with twenty
three acres of land or thereabouts, as tenant to my bro-
ther *Thomas Frankis*, at a yearly rent of 60*l.*, from the
4th day of July 1837, the rent to be paid quarterly;
and I further acknowledge to stand indebted to the said
Thomas Frankis in the sum of 60*l.* for the first year's
rent, which was due on the 4th day of July instant. I
have, on the signing hereof, paid to Mr. *Edward Wash-
bourne*, as the attorney of the said *Thomas Frankis*, the
sum of 6*d.* in part of the said rent so due to him as
aforesaid.

" Witness *Joseph Roberts*.

" *Jonathan Frankis*."

This

This document was objected to as inadmissible, not being stamped.

For the defendant it was urged that the mere production of a written instrument, purporting to contain terms of the tenancy, was sufficient to defeat the plaintiff's case, by shewing that he had not given the best evidence. And that, if the instrument required to be substantiated in the ordinary manner as evidence for the defendant, still it required no stamp, being merely an acknowledgment; *Doe dem. Linsey v. Edwards* (a); *Doe dem. Wright v. Smith* (b). The learned Judge held, on the authority of *Fielder v. Ray* (c), that the mere production of the written paper was not sufficient to nonsuit the plaintiff, but that the defendant was bound to make it evidence in the regular manner; and that, for want of a stamp, it was not admissible (d). Verdict for plaintiff.

1840.

Doe dem.
FRANKIS
against
FRANKIS.

Ludlow Serjt. now moved for a new trial on account of the rejection of evidence. The paper was receivable as an acknowledgment, and did not require a stamp. There is none applicable to it. [*Denman* C. J. Looking at it as an acknowledgment, it was merely your client's own statement.] It came out of the plaintiff's custody, and was equivalent to a declaration made in his presence. [Lord *Denman* C. J. In the case of such a declaration, the conduct of the party hearing it is the evidence (e).] Whatever is said in the hearing of another is evidence against him, *valeat quantum*. In

(a) 5 A. & E. 95. (b) 8 A. & E. 255. (c) 6 Bing. 392.

(d) It was also objected that the attesting witness ought to have been called; but the learned Judge held this unnecessary, as the document came from the custody of the plaintiff, who claimed an interest through it.

(e) See the authorities, 1 *Phil. on Ev.* 372. 8th ed.

1840.

DOE dem.
FRANKIS
against
FRANKL.

Tomkins v. Ashby (a), where the written words, "Mr. T. has left in my hands 200*l.*," were held to be an acknowledgment and not a receipt, Lord *Tenterden* said, "I am of opinion that a stamp was not necessary in this case. Acts of parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the legislature." Here the instrument stipulated nothing; there was no clause on which a breach could be assigned. It was like an I. O. U., or an attornment. [*Littledale J.* By stat. 55 G. 3. c. 184. sched. part I, tit. *Agreement*, the memorandum requires a stamp, whether it "be only evidence of a contract," or be itself obligatory.] In *Mullett v. Hutchison* (b) a memorandum in these words, "I have in my hands three bills, which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand," was held admissible without a stamp. That was a stronger case than the present; and there the words of the Stamp Act, just referred to, were under the notice of the Court. [*Patterson J.* Here you put in the document as evidence of a contract. Unless it was so, it was of no use to you.] It might qualify the contract. [*Coleridge J.* It appears from the note on *Mullett v. Hutchison* (b), in 1 *Manning* and *Ryland* (c), that the memorandum produced there was the only evidence of the promise stated in the declaration. That observation is in your favour, if the case be sound; but it makes the authority of the case doubtful. The point was argued only on motion for a new trial.]

(a) 6 B. & C. 541.

(b) 1 Mann. & R. 522.

(c) 1 Mann. & R. 524. note (b).

Lord

LORD DENMAN C. J. It is a great deal too broad a proposition to say that every paper which a man may hold, purporting to charge with a debt or liability, is evidence against him if he produces it. Here, however, the paper does appear to relate to something in which the landlord took part. But what is its effect when produced? It shews the agreement between the landlord and tenant; and it was put in for that. In *Mullett v. Huchison* (a) the memorandum produced, and held admissible, was never meant to be evidence of the contract, though it contained what had formerly passed between the parties. I do not think that decision was wrong.

1840.

DOX dem.
FRANKIS
against
FRANKIS.

LITTLEDALE J. Attornments seem to stand upon a foundation of their own, and to have rules applicable peculiarly to themselves. Here the acknowledgment of holding might be considered as an attornment; but then the memorandum states the rent, and contains an undertaking to pay. It differs but little from the counterpart of a lease.

COLERIDGE J. This is, in substance, the counterpart of a lease. The tenant says, not only that he holds, but that he holds at a rent, and payable quarterly; and that he is indebted for the first year's rent, which is already due, and is mentioned as distinct from the other rent. I am not satisfied with the case of *Mullett v. Huchison* (a). *Holroyd J.* there (b) gives a very doubtful judgment. I think there should be no rule.

PATTESON J. concurred.

Rule refused.

(a) 7 B. & C. 639. S. C. 1 Mann. & R. 522.

(b) 1 Mann. & R. 526.

1840.

Thursday,
April 23d.

DOE on the demise of GRISMOND PHILLIPPS
against JOHN PHILLIPPS and ANNE his Wife.

On surrender of a lease for lives, purporting to be made in consideration of 120*l.* and of a new lease to be granted to the surrenderor for his life, the deed does not require an agreement stamp in addition to the ad valorem stamp; the stipulation for a new lease not being a "matter or thing besides what" is "incident to the sale and conveyance," within stat. 55 G. 3. c. 184. sched. Part I. tit. Conveyance.

EJECTMENT for messuages, &c., in the county of *Carmarthen*. On the trial, before *Maule J.*, at the *Carmarthen* Spring assizes, 1840, the plaintiff's counsel offered in evidence a surrender to the lessor of the plaintiff, by *David Davies*, tenant of the premises under a lease for lives. The surrender was by indenture between *Davies* of the one part and the lessor of the plaintiff of the other part; and, after reciting the lease, and that the interest under it was vested in *Davies*, the reversion being in the lessor of the plaintiff, and that *Davies*, in consideration of 120*l.*, and of a new lease to be granted him for his life by the lessor of the plaintiff at an increased rent, had agreed to surrender the premises to the lessor of the plaintiff, it was witnessed that, in consideration of 120*l.*, and of such new lease to be granted, *Davies* surrendered the premises to the lessor of the plaintiff and his heirs. The surrender was on a 1*l.* 10*s.* stamp. For the defendant it was insisted that an agreement stamp also was requisite. The learned Judge held otherwise, and admitted the deed, but gave leave to move to enter a nonsuit: and the plaintiff had a verdict.

Wilson now moved to enter a nonsuit. This was clearly a sale of *Davies's* interest; and the indenture required two stamps; the ad valorem stamp of 1*l.* 10*s.*, and an agreement stamp in respect of the undertaking to grant a new lease. For stat. 55 G. 3. c. 184. sched. Part. I., tit. *Conveyance*, enacts that,
"Where

“Where any deed or instrument, operating as a conveyance on the sale of any property,” “shall also contain any other matter or thing besides what shall be incident to the sale and conveyance of the property sold, or relate to the title thereto; every such deed or instrument shall be charged, in addition to the duty to which it shall be liable as a conveyance on the sale of property, and to any progressive duty to which it may also be liable, with such further stamp duty as any separate deed, containing the other matter, would have been chargeable with, exclusive of the progressive duty.” The reference to the intended new lease, in this indenture, amounted to an agreement by the lessor of the plaintiff to grant such lease; a bill in equity might have been maintained against him for a specific performance. The deed, therefore, did contain other matter than that which was “incident to the sale and conveyance of the property sold,” or related to the title; and it required the stamp which would have been put upon a separate agreement for a lease. The agreement could not properly be considered as incident to the sale and conveyance; it is rather of a contrary character, since it stipulates that the property shall, on certain terms, be reconveyed to the vendor.

The Court (a) however, were of opinion that the stamp was sufficient; that the agreement for a new lease was part of the contract; and that the reference to it was not a “matter or thing,” not “incident to the sale and conveyance,” but was necessarily connected with it. The rule was therefore

Refused (b).

(a) Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

(b) Ex relatione Wilson.

1840.

DOX dem.
PHILLIPS
against
PHILLIPS.

1840.

Friday,
April 24th.

HARTLEY *against* HARMAN.

Plaintiff was hired as superintendent of works at the rate of 150 guineas a year from a day named : either party to have the option of determining the engagement by a month's notice. At the end of eighteen months plaintiff was dismissed without notice, or cause assigned, eighteen months' wages being then due to him. A month after dismissal he brought an action, declaring specially on the agreement, and stating, as the breach, that defendant would not continue plaintiff in his employ till the expiration of such month's notice, but discharged plaintiff in the middle of a year without notice; whereby plaintiff lost all the wages, profits, &c., which he might have derived from continuing in defendant's service, and was still unemployed.

Held that the contract was for dismissal on a month's warning or month's wages, and that, on this count, plaintiff could recover only the month's wages.

But that he might have added a common count for work and labour, and recovered under it his wages for the eighteen months.

DECLARATION (of *November* 18th, 1839) stating that on 1st *April*, 1838, in consideration that plaintiff would become and be servant of defendant, viz. in the capacity of superintendant of works, at and for certain wages, viz.: 157*l.* 10*s.* per annum, and upon certain terms, viz., amongst others, that the said contract of service should not be determined without a month's notice for that purpose, defendant undertook and then faithfully promised plaintiff to retain and employ plaintiff in his, defendant's, service in the capacity aforesaid, and at and for the wages and upon the terms aforesaid. And, although plaintiff, confiding &c., became and was servant to defendant, viz. in the capacity and on the terms aforesaid, and continued in such service, viz. from thence until 5th *October* 1839, and although plaintiff hath always been ready and willing to continue in the said service in the capacity and on the terms aforesaid, until the expiration of such month's notice, yet defendant, not regarding &c., did not nor would continue plaintiff in his said service and employ until the expiration of such month's notice as aforesaid, but on the contrary thereof wholly neglected and omitted to give plaintiff such month's notice, and then and in the middle of a year discharged plaintiff therefrom, without any notice or warning whatever, and hath from that time hitherto

wholly

wholly neglected and refused to retain or employ plaintiff in his said service or employ: by means whereof plaintiff hath lost and been deprived of all the wages, profits, and advantages, meat, drink, lodging, and necessities, which he might and would have derived and acquired from being continued in the said service of defendant, and hath been and is by means of the premises still wholly unemployed. Count on an account stated.

Pleas. 1. Non assumpsit. 2. That, after the making of the contract &c., viz. on 5th *October*, 1839, defendant gave plaintiff one month's notice of determining the said contract and requiring plaintiff to leave the service and employ of defendant at the expiration of one month from the time of the giving such notice: that defendant was always ready and willing to continue plaintiff in such service and employ until the expiration of such month's notice as aforesaid; but that plaintiff afterwards, and before the expiration of such month's notice, viz. on the day and year aforesaid, voluntarily left the said service and employ of defendant. Verification.

Replication to plea 2. That defendant wrongfully discharged plaintiff from his said service in manner and form &c., without this, that defendant gave plaintiff one month's notice &c. (traversing the notice as averred in the plea). Issue thereon.

On the trial before Lord *Denman* C. J. at the sittings in *London* after last term, it appeared that defendant was chairman of an asphaltum and coal company, by which plaintiff was retained, as stated in the declaration, under an agreement to the following effect: "The salary to be at the rate of 150 guineas per annum, commencing from the first day of *April* 1839 (a): either party to have the option

(a) The terms were so stated in a minute of the company, made about a year after plaintiff had entered the service.

1840.

HARTLEY
against
HARMAN.

of

1840.
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HARTLEY
against
HARMAN.

of terminating the engagement by giving one month's written notice." He entered the service, *April 1st*, 1838, and was dismissed, without previous notice, by the following letter from defendant, dated *October 3d*, 1839. "Sir, I beg to inform you, by order of the directors of the *English Patent Coal Company*, that your services are not longer required by them, and that you are no longer to consider yourself in their employ. Your obedient servant, *John Harman*, chairman." It did not appear that any reason had ever been assigned. After the expiration of a month from that day he brought the present action, claiming wages at the above rate down to the end of the second year. The Lord Chief Justice was of opinion that, on this declaration, he could claim only for the month; and a verdict was taken for 13*l.* 2*s.* 6*d.*, but leave given to move to increase the damages.

Kelly now moved accordingly. This was a yearly contract, determinable by a month's notice: the plaintiff could not properly be dismissed without such notice; and, in default of it, he was entitled to wages for the whole year. But at all events he may claim compensation for the time of his actual service, and a month beyond, beginning with the day of his discharge. [Lord *Denman* C. J. It appeared to me that the stipulation as to a month implied a month's warning or a month's wages; and that the plaintiff might recover these, but not wages for the time of actual service, there being no count for work and labour.] The plaintiff is at least entitled to recover his wages for the work really done; and he can recover those only as damages, not under the contract. [Lord *Denman* C. J. Does he lose them in consequence of being dismissed without a month's notice? *Patteson* J. He

He would have been in the same situation, as to that claim, if the notice had been regular.] In *Pagani v. Gandolf* (a) the plaintiff, being retained on a hiring for four years at so much per annum, was dismissed in the course of the year; and *Best* C. J. held that, on a special count founded upon the contract, he might recover for the whole term, if the dismissal was wrongful. *Beeston v. Collyer* (b) was a similar case. [Lord Denman C. J. Why did not the plaintiff here add a common count?] It might have been said that this was adding a second count for the same cause of action. [Littledale J. Might not the plaintiff have treated the notice as a notice to quit at the end of the month? he might then, at the month's end, have sued for the month's wages, and also for those earned in the preceding months.] He was not bound to do so; and he might proceed for unliquidated damages, the wages not being necessarily the measure of his loss.

1840.

 HARTLEY
 against
 HARMAN.

LORD DENMAN C. J. I believe I pressed the defendant to let a verdict pass for the whole amount of wages due, in order that another action might not be brought: but the plaintiff stood upon his declaration, which was for dismissing him without a month's notice. On such a dismissal a month's wages must be looked upon as stipulated damages: and the parties seem agreed on this: but then it is said that the prior wages also are part of the damages. I think that it is not so. The plaintiff might have declared in a special count for the month's wages, and in a common count for the rest. As it is, he can recover for the month only. To

(a) 2 Car. & P. 370.

(b) 4 Bing. 309.

1840.

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HARTLEY
against
HARMAN.

grant a rule would only suspend proceedings for a long time; and then the plaintiff would have to bring an action for work and labour.

LITLEDALE J. The plaintiff may now sue for his wages down to the time of dismissal; but the form of his declaration precludes him from recovering them in this action. The contract having been put an end to, he declares for damages in respect of the dismissal without notice: that shuts out the claim for wages. He must recover them in an action for work and labour.

PATTESON J. An ingenious argument has been urged to supply the omission of a common count, which there is no doubt the plaintiff might have added. It is not correctly stated that the agreement was for a year; the hiring was "*at the rate* of a hundred and fifty guineas per annum;" therefore the year was divisible.

COLERIDGE J. The breach of contract stated is dismissal without notice. All the damage consequent upon that is the loss of a month's wages.

Rule refused (a).

(a) See *Smith v. Hayward*, 7 A. & E. 544.

1840.

CARPENTER *against* WALL.Friday,
April 24th.

CASE for debauching plaintiff's daughter, whereby she became pregnant &c. Plea, Not guilty. On the trial, before Lord Denman C. J. at the sittings in *Middlesex* after last term, the plaintiff's daughter proved that she had been seduced by the defendant, and borne a child in consequence. She was asked, in cross-examination, whether she knew a man named *A. B.* (a); and she denied it. A witness for the defence was subsequently asked whether the plaintiff's daughter had not told witness that *A. B.* was the father of the child, and had seduced and left her. The question was objected to, because the witness had not been asked, in cross-examination, whether she had ever made those statements. The Lord Chief Justice refused to allow the question to be put. Verdict for plaintiff.

The general rule is, that, if a party to a cause wishes, on the trial, to impeach an adverse witness by proof of his having used certain expressions, the witness himself must first be asked whether he used them.

Semble, that, where the witness's moral character is relevant to the issue, such expressions may be proved without the previous enquiry, if they tend merely to disgrace the witness by shewing that he has made unbecoming declarations.

But, Held that, even if they be of such a nature, the introductory question must not be dispensed with if they tend like-

Humfrey now moved for a new trial, on account of the rejection of evidence. The rule, that a witness must be asked whether he made the statement which it is intended to prove against him, prevails only where the object of such proof is to impeach his credit as a witness. There it is fit that the party should have an op-

portunity to contradict some part of the witness's evidence. Therefore,

In an action against *A.* for seducing and getting with child the plaintiff's daughter, which facts the daughter proves, the defendant cannot give evidence that she has talked of *B.* as her seducer and the father of her child, unless she be first asked in cross-examination whether she ever used those expressions.

(a) There appeared to be some doubt as to the precise form in which the question had been put; but the argument proceeded on the assumption that it had been put substantially as above stated.

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1840.

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 CARPENTER
 against
 WALL.

portunity of explaining the circumstances under which, if at all, the statement was made. But here the expressions of the witness were tendered to shew the looseness of her conduct; a description of evidence which is admissible in actions for seduction and criminal conversation. The question was, what loss the father had sustained; and that depended on the value of the daughter's previous character. A person who lightly made such declarations as those suggested could not have been one whose loss of character called for heavy damages. And the imputation against her might have been proved by the evidence in question, even if she had not been called. The argument on the other side would tend to shew that such evidence could not have been regular in any point of view, unless she had denied making the declarations.

LORD DENMAN C. J. If the language had been offered in evidence as shewing that the witness went about in a light manner saying things of this description, I should not have rejected it. But the evidence was put pointedly as bearing upon particular facts which she had stated. When words are to be proved as having been uttered by a witness, it is always expected that he shall have an opportunity of explanation; and that rule applies here.

LITLEDALE J. There is no doubt that these declarations could not be made evidence without first asking the witness if she ever uttered them, unless they had been offered merely as shewing misconduct.

PATTERSON J. I like the broad rule, that, where you mean to give evidence of a witness's declarations for any purpose,

purpose, you should ask him whether he ever used such expressions. It is true that the evidence here might have been admissible if intended only to shew the utterance of loose language by the party. But the proof offered went in direct contradiction to the evidence she had given, that the defendant was the father of her child.

1840.

CARPENTER
against
WALL.

COLERIDGE J. I do not much dissent from the manner in which Mr. *Humfrey* has laid down the general rule. But this evidence was offered as contradiction.

Rule (on this point) refused.

Rule nisi on affidavits.

SHARPE against LAMB and GRAEME.

Friday,
April 24th.

THIS was an action of assumpsit, tried before Lord Denman C. J., at the *Middlesex* sittings after last *Hilary* term. *Lamb* had suffered judgment by default; *Graeme* defended. The defendant's counsel called for a letter (notice to produce which was admitted) from the plaintiff to *Lamb*, dated 2d *February* 1830. The letter not being produced, the defendant's counsel tendered an alleged copy, which had been admitted under a Judge's order (a) in the usual form, that the plaintiff should "make the admissions specified in the following notice."

Under *Reg. Gen. Hil.*
4 *W. 4.* 20.,
where of two
defendants, *G.*
and *L.*, *L.* had
suffered judgment by default, a judge's order of admission was made on notice that defendant *G.* proposed to adduce the documents specified (which might be inspected), and that plaintiff

would be required to admit that they were copies of, or extracts from, original documents (as they purported to be): and the documents were described as "copies of, or extracts from, letter from plaintiff to defendant, dated" &c.

Held, that this did not authorize the giving in evidence such copy without further proof of the original, though notice had been given to produce, it not being proved that plaintiff had the original.

(a) *Reg. Gen. Hil.* 4 *W. 4.* 20., 5 *B. & Ad.* xvii, xviii.

1840.

SHARPE
against
LAMB.

"Take notice, that *William Theophilus Graeme*, one of the defendants in this cause, proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the plaintiff" &c.; "and that the plaintiff will be required to admit that the said documents are respectively such copies of, or extracts from, original documents as they respectively purport to be."

"Descriptions of the documents.

Copies of or extracts from	Dates.
Letter from plaintiff to defendant <i>Lamb</i>	2d Feb. 1830.
Same to same," &c.	

It was objected that no foundation was laid for the production of secondary evidence, as it was not shewn that the original was, or had been, in the plaintiff's possession. The Lord Chief Justice rejected the evidence. Verdict for plaintiff.



Crowder now moved for a new trial, on the ground of rejection of evidence. By the admission, the plaintiff recognises the document as a true copy. It is as if he had said, I wrote a letter, of which this is a copy, to the defendant *Lamb*. The absence of the usual words "saving all just exceptions" cannot perhaps be relied on. [*Patteson J.* I have often heard parties at Chambers object to make this admission, lest they should admit the original; and I have always told them that they could not be prejudiced, because the original must not the less be shewn or accounted for.] The defendant *Graeme* has no means of compelling the defendant *Lamb*, to whom the letter is addressed, to produce it, or account for its absence, supposing it to have been sent.

LITTLEDALE

LITLEDALE J. There is no ground for this application. All that is admitted is that the copy is correct; it is not admitted that the plaintiff wrote or sent the letter; that must be proved. Had the admission been that the plaintiff wrote a letter of which the alleged copy was a correct copy, it would have been sufficient.

1840.

 SHARPE
against
LAMBE.

PATTESON J. Perhaps no injustice would be done in the particular case by holding that this was good evidence. But, generally, if the admission of a copy were an admission of the original, no admissions would be made. The attempt is to treat as an original that which is only admitted to be a copy.

COLERIDGE J. The principle contended for would be very dangerous. It would apply to deeds as well as letters: and, when once the correctness of the copy was admitted, no original would be produced.

Lord DENMAN C. J. The Judge's order here secures the accuracy of the secondary evidence, but does not give it the effect of primary evidence.

Rule refused.

COLE *against* HADLEY.

Saturday,
April 25th.

TRESPASS quare clausum fregit. Pleas. 1. Not guilty. 2. Not possessed. Issues thereon. On the trial, before *Patteson J.*, at the last spring assizes for *Gloucestershire*, the question on the second issue was, On issue joined upon the plea of Not possessed, in trespass quare clausum fregit, defendant may use as evidence the deposition of a witness, formerly called by plaintiff to prove his possession in a proceeding before justices for an alleged trespass on the same close. It makes no difference that the witness is still alive.

1840.

 COLE
 against
 HADLEY.

whether, at the time in question, plaintiff or defendant was the tenant of a field, part of certain glebe lands. The defendant proved that, during the period for which plaintiff alleged himself to have been tenant, he had laid an information against defendant at the *Berkeley* petty sessions, for a malicious trespass on the premises in question; that the information was heard at those sessions; and that plaintiff, on that occasion, called Mr. *Dunsford*, the incumbent, to prove that plaintiff was his tenant. And defendant, on the trial of this cause, put in the deposition then made by *Dunsford*, in which he denied that plaintiff was his tenant. *Dunsford* had since gone abroad, and had not returned. This evidence was objected to by the plaintiff's counsel, but received. Verdict for plaintiff on the first issue; for defendant on the second.

Godson now moved for a new trial on account of the improper reception of evidence. No authority goes so far as to warrant admitting the deposition of a party not deceased in a case like the present. [*Patteson* J. referred to *Gardner v. Moult* (a). Lord *Denman* C. J. There *Brickell v. Hulse* (b) was relied upon; in which case *Rushworth v. The Countess of Pembroke* (c) was noticed, and shewn not to be an authority for excluding the evidence.]

Per Curiam (d),

Rule refused.

(a) 10 A. & E. 464.

(b) 7 A. & E. 454.

(c) *Hardr.* 472.

(d) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

1840.

STOCKDALE *against* JAMES HANSARD, LUKE *Saturday,*
GRAVES HANSARD, and LUKE JAMES HANSARD. *April 25th.*

This case is reported, page 297, *antè*.

HAIGH *against* BROOKS.

Monday,
April 27th.

This case is reported, 10 *A. & E.* p. 321.

The QUEEN *against* The Justices of MIDDLESEX. *Monday,*
April 27th.

TWO justices of *Middlesex* made an order, dated 2d *January* 1839, removing *Jane Foyster* from the parish of *Tottenham* to the parish of *St. Pancras*, both in *Middlesex*. The removal was made upon her own examination, in which she stated herself to be a single woman, and to have gained a settlement in *St. Pancras*, by hiring and service, about thirteen years before the order. The pauper was removed to *St. Pancras*. That parish lodged an appeal at the next *Middlesex* quarter sessions after the order, held in *April* 1839; and the sessions, on 9th *April*, ordered that the appeal should be heard on 24th *April* then next, notice of which

An order of removal was, at the instance of the removing parish, and after the pauper had been removed and an appeal lodged at sessions, superseded by an order of the removing justices, which recited that the removing parish had discovered the original order to be founded on an incorrect examination.

Held, that the supersedeas was too late, and that the appellants had a right to insist on the appeal being heard.

And, the sessions having refused to hear it, a mandamus issued commanding them to enter continuances and hear.

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1840.
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 The QUEEN
 against
 The Justices of
 MIDDLESEX.

was served on the respondents on 11th *April*. After this, the respondents received information that the pauper was a married woman at the time of the hiring and service, but that her husband's settlement also was in *St. Pancras*. They therefore obtained, from the two justices who had made the order of removal, an order of supersedeas, dated 22d *April*.

The supersedeas, after reciting the order of removal, the removal, and the service of the order of removal on the appellants, proceeded as follows. "And whereas it has been since represented and duly made appear unto us the said justices, by the overseers of the poor of the said parish of *Tottenham*, that the examination and declaration of the said *Jane Foyster*, taken upon the making of the said order as aforesaid, were founded in mistake, which has since been discovered, for that the said *Jane Foyster* was not a single woman at the time of her service with her master, as stated in such examination and declaration, and therefore did not gain a settlement by such service; but that the said *Jane Foyster* is nevertheless legally settled in the said parish of *St. Pancras* by reason of her husband, *Edward Foyster*, being legally settled in the said parish of *St. Pancras* by renting," &c. ; "therefore we, the said justices, upon the application of the said churchwardens and overseers of the poor of the said parish of *Tottenham* (in order to prevent the charges and expenses of an appeal to the general quarter sessions of the peace for the said county of *Middlesex* against the said order of removal), do hereby supersede, annul, vacate, and make void and set aside the said order, and do command the overseers of the poor of the said parishes respectively to give up and return the said order accordingly, and the copy thereof,

thereof, to us, that the same may be cancelled and made void to all intents and purposes whatsoever. And we do require the said overseers of the poor of the said parish of *Tottenham* to receive back the said *Jane Foyster*, and maintain and provide for her until they can free themselves from the charge thereof by due course of law."

1840.

The QUEEN
against
The Justices of
MIDDLESEX.

The appellants appeared by counsel at sessions, on 24th *April*; and the appeal was called on in its turn. The respondents then insisted on the supersedeas; and the Court (after hearing the objection to the proposed course by the counsel for the appellants) refused to entertain the appeal, considering that the order was no longer in existence after the supersedeas.

On affidavit of the above facts, a rule was obtained last *Trinity* term, calling on the justices of *Middlesex* to shew cause why a mandamus should not issue, commanding them to enter continuances and hear the appeal.

Erle and *Lucas* now shewed cause. The removing parish had a right to abandon their own order, even after execution; *Rex v. Diddlebury (a)*. There Lord *Ellenborough* said, "There are two ways of getting rid of an order, one by consent of the parish in whose favour it is made to abandon it; the other, by waiting till the time of appeal and appealing against it to the sessions, by whom it may be quashed if not supported. Here the parish in whose favour it was made, finding upon further information that they could not support it, very sensibly determined to abandon it at once by consent, and acted accordingly. And what objection can there

(a) 12 *East*, 359.

1840.
 ———
 The QUEEN
 against
 The Justices of
 MIDDLESEX.

be, as Lord *Mansfield* observed in the case mentioned, to a party's abandoning a judgment intended for his own benefit?" The case alluded to was *Rex v. Llanrhydd* (a), where it was holden that a parish might abandon an order of removal, by simply consenting to take the pauper back. In *Rex v. The Justices of Norfolk* (b) a supersedeas of an order of removal was obtained and served on the appellants by the removing parish, after which the sessions refused to allow the appeal to be entered; and this Court refused to order the sessions to enter continuances and hear, saying that the matter was in the discretion of the sessions. [*Coleridge J.* That is a very different case from the present: here the sessions *have* permitted the appeal to be entered. Have not the sessions, in effect, dismissed the appeal, and will not that operate as a confirmation of the order?] The respondents are willing to pay all the costs which have been occasioned: but they desire not to be precluded, by an appeal against a removal made upon incorrect evidence, from removing upon correct evidence (c). Sect. 81 of stat. 4 & 5 W. 4. c. 76. confines the evidence to be given on this appeal to the ground stated in the examination.

Sir *F. Pollock* (with whom was *Prendergast*), *contra*. The two justices had no power to supersede after the appeal was lodged: nor had the respondents any power to abandon their order at that stage, more than a plaintiff could have to be nonsuited after the allowance of a bill of exceptions and the removal of the cause into a court of error. (He was then stopped by the Court.)

(a) *Bur. S. C.* 658.

(b) 5 B. & Ald. 484.

(c) See *Regina v. Clint*, *antè*, p. 624. note (b).

Lord

LORD DENMAN C. J. The error has been discovered too late. It is as if the respondents had not perceived the mistake till the case was in the course of being heard, when, no doubt, under sect. 81 of stat. 4 & 5 W. 4. c. 76., they would be precluded from going out of the grounds of settlement disclosed in the examination.

1840.

The QUEEN
against
The Justices of
MIDDLESEX.

LITLEDALE and PATTESON Js. concurred.

COLERIDGE J. We have no means of judging of the merits of the case. The only effect of the supersedeas is to shew that the parties think the order of removal wrong.

Rule absolute.

YORKE *against* CHAPMAN (*a*).

Tuesday,
April 28th.

TRESPASS against the marshal of the Queen's Bench, for assaulting and imprisoning the plaintiff. Pleas. 1. Not guilty; 2. A justification, under the rule of this Court of *Easter* term, 6 G. 4. (*b*) (5th May 1825).

In an action against the marshal of Q. B. for assaulting and imprisoning plaintiff, it appeared that the

On act was committed in alleged enforcement of the prison discipline, by a person acting as deputy marshal; but the appointment of such person was not proved, nor any recognition of him by defendant, nor any other circumstance connecting defendant with his acts.

Held, insufficient; and that evidence at least should have been given to raise a presumption that the deputy was acting under a general or particular authority from defendant.

(*a*) See, as to a previous application in this cause, *Yorke v. Chapman*, 10 A. & E. 207,

(*b*) Which ordains (sect. 1) that, if any prisoner in custody of the marshal shall commit any of the acts after specified, it shall be lawful for the marshal of the said prison, for the time being, to confine such prisoner in such of the strong rooms of the said prison as the marshal shall think proper, and for such time as the said marshal shall adjudge and think adequate to the offence, not exceeding one calendar month for the first offence; and in case of a second offence it shall be lawful for the marshal

to

1840.

YORK
against
CHAPMAN.

On the trial, before Lord Abinger C. B., at the last Surrey assizes, it appeared that the act complained of was done by a person acting as deputy marshal; but no evidence was given connecting the defendant with the act, nor shewing the actual appointment of the deputy, or a recognition of him by defendant. The Lord Chief Baron was of opinion that this established no case against the defendant, and proposed to nonsuit the plaintiff: but, his counsel declining to be called, his Lordship directed a verdict for the defendant, which was found accordingly.

Thesiger now moved (a) for a new trial, on the ground of misdirection. The deputy marshal is not a principal officer recognised by the law: he acts simply as the servant of the marshal, who appoints him, under stat. 27 G. 2. c. 17. s. 7., and who is therefore responsible generally for his acts, without proof of an order given by the marshal in the particular case. In *Woodgate v. Knatt's bull* (b) the sheriff was held liable for the act of his officer in taking excessive fees. In *Raphael v. Goodman* (c) a sheriff was charged with fraud in the plea; and this allegation was holden to be supported by proof of legal fraud on the part of his officer, though it was not pretended that the sheriff was personally cognizant of any part of the transaction.

Cur. adv. vult.

confine such prisoner in any of the strong rooms, at the discretion of such marshal, for such time as he shall adjudge and think adequate for the said offence, not exceeding three calendar months. And, by sect. 3, the marshal is directed to make entries, in a book, of the orders for such confinement, stating certain particulars, and to lay such book, or a copy, before the Judges of K. B. on the first day of the next term.

(a) Before Lord Denman C. J., Patteson, and Coleridge Js.

(b) 2 T. R. 148.

(c) 8 A. & E. 565.

Lord

Lord DENMAN C. J. now delivered the judgment of the Court.

This was moved on the ground of a misdirection, the learned Chief Baron having told the jury that they must find a verdict for the defendant, after the plaintiff's counsel had refused to be nonsuited. The action was brought against the marshal of the Queen's Bench prison for an assault committed by the deputy marshal on a person in custody. That person's appointment as deputy was not proved, nor that defendant had given any order to assault or imprison the plaintiff, or had any knowledge that, in fact, he had been imprisoned: but the plaintiff's learned counsel contended that the marshal was responsible for his deputy's misconduct, *precisely in the same manner as the sheriff for that of his under-sheriff or any of his inferior officers*. But that exists only where the relation of under-sheriff is proved, or the officer is set in motion by the sheriff's warrant, and the offence is committed in the course of acting as under-sheriff, or in execution of the warrant. In the present case, the opinion of the jury might have been taken whether the manner in which the affairs of the prison were carried on did not prove an appointment of the imprisoning party, or whether the facts did not shew the imprisonment to be an act of discipline which the defendant must have sanctioned: but, this not having been done, the evidence, being only that the plaintiff was imprisoned by a person whom he called deputy marshal, fell short of what would be necessary to support a case against the sheriff for the act of his officer, supposing that analogy to be complete.

Rule refused.

1840.

YORKE
against
CHAPMAN.

1840.

Tuesday,
April 25th.

WISE *against* HODSOLL.

Trespass for an assault and battery. Plea of non assault demesne, beginning, "And for a further plea in this behalf," and alleging that, "just before the said time when &c.," plaintiff assaulted defendant, and would have beaten him if he had not immediately defended himself &c., "wherefore he, the defendant, did then defend himself against the plaintiff," &c.; and that, "if any hurt or damage then happened or was occasioned" to plaintiff, the same happened and was occasioned by the assault of plaintiff on defendant, and in the necessary defence &c.

Held, on special demurrer, that the plea sufficiently confessed an assault and battery; and that, the hypothetical averment, "if any" &c., relating merely to "hurt or damage," not to the fact of an assault, the form was no ground of objection.

TRESPASS for assaulting and beating plaintiff.

Second plea. And for a further plea in this behalf the defendant says that, just before the said time when &c., to wit on the day and year in the declaration mentioned, the plaintiff with force and arms assaulted him the defendant, and would then have beat, bruised and ill treated him, if he had not immediately defended himself against the plaintiff; wherefore he the defendant did then defend himself against the plaintiff as he the defendant lawfully might for the cause aforesaid; and the defendant further says that, if any hurt or damage then happened or was occasioned to the plaintiff, the same happened and was occasioned by the said assault of him the plaintiff upon him the defendant, and in the necessary defence of himself the defendant against the plaintiff. And this &c. (verification).

Demurrer, assigning for causes that the plea does not sufficiently confess and admit the assaulting and beating of plaintiff by defendant in manner and form as alleged in the declaration; that the plea contains no confession of any assault or battery of plaintiff by defendant; that the allegation in the plea, that defendant did at the same time when &c. defend himself against plaintiff, is no confession of any assault or beating of plaintiff by defendant, nor is it to be implied that such alleged defending &c. was an active and not a passive defence; that the plea should have admitted that the said alleged

defence

defence of himself by defendant consisted of and was the alleged assault and beating in the declaration mentioned; and that it is alleged in the plea that, *if* any hurt or damage then happened or was occasioned to plaintiff, the same happened or was occasioned by the said assault of plaintiff upon defendant, and in the necessary defence &c., which is an evasive and insufficient confession of any hurt or damage having been occasioned to the plaintiff by the said assault and beating. Joinder in demurrer.

1840.

Wise
against
Hobbs.

[*Miller* for the plaintiff. This plea fails in the same manner as that which was held bad in *The Earl of Manchester v. Vale* (a); it attempts to justify, but does not confess, and therefore amounts to the general issue. "The time when" &c., there, was not considered as implying an admission. [*Coleridge J.* The plea there was very different.] This plea does not shew that the defendant used any active means of defence. The averment, that, if any damage happened to plaintiff, the same happened by plaintiff's assault on defendant, might mean that the plaintiff hurt himself in assaulting the defendant: and the hypothetical admission, "if any" &c., was held insufficient in *Gould v. Lasbury* (b), and *Margetts v. Bays* (c). [Lord Denman C. J. Here the words are, "if any hurt or damage happened to the plaintiff," not, "if the defendant assaulted the plaintiff." *Littledale J.* In *Lowe v. King* (d) and *Greene v. Jones* (e) this form was used, and no objection taken, though the declaration was demurred to in each case.] In the first

(a) 1 Saund. 23 a.

(b) 1 Cro. M. & R. 254. S. C. 4 Tyrwh. 863.

(c) 4 A. & E. 489.

(d) 1 Saund. 76.

(e) 1 Saund. 295 c.

of

1840.

WINE
against
HOSKELL.

of those cases the commencement of the plea of son assault demesne stated it to be pleaded "as to the assaulting, beating," &c.: and in the latter case the commencement was to the same effect. [*Patteson* J. The commencement of this plea, "and for a further plea in this behalf" (a) &c., refers to the whole declaration.]

Platt, contra, was stopped by the Court.

LORD DENMAN C. J. We think the assault and battery are sufficiently confessed.

LITLEDALE, PATTESON, and COLERIDGE Js. concurred.

Judgment for defendant (b).

(a) The first plea (not stated in the paper-book) was Not guilty.

(b) In the course of the argument *Platt* referred to the precedents in *Winch's*, *Coke's*, and *Lily's Entries*. See *Winch*, 1121. *Co. Ent.* 644. *Lil. Ent.* 457.

1840.

SCALES *against* Sir JOHN KEY, Baronet, and *Thursday, April 30th.*
Others.

CASE against the Lord Mayor and certain aldermen of the city of *London*, for a false return (a) to a mandamus which called upon them to admit and swear in plaintiff to the office of an alderman of *Portsoken* ward (he having, in 1831, been duly elected to such office), or shew cause to the contrary. The declaration assigned falsehood on part of the return which alleged, as an immemorial custom, that the court of mayor and aldermen have had the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning the election and return of every person elected into any place or office within the said city at any such wardmote court holden as was before stated, whensoever the merits of such election or return have been brought into question by the petition of any person

The custom of the city of *London*, for the court of mayor and aldermen to examine and determine, upon petition, whether or not any person elected alderman of a ward, and returned to the said court as such alderman, be, according to their discretion and sound consciences, a fit and proper person, duly qualified, is not abrogated by stat. 11 G. 1. c. 18., nor by the by-law of the city, 18 *Ann.*, "for reviving the

ancient manner of electing aldermen," which (after reciting that, by the ancient custom of the city, when any ward became vacant of an alderman, the inhabitants of that ward, having right to vote, were wont to choose one person only, being a citizen and freeman, to be alderman of the ward,) enacts that, for reviving that custom, and restoring to the inhabitants their ancient right of choosing one person only to be their alderman, there shall from thenceforth, in all elections of aldermen of the city, at a wardmote to be holden for that purpose, be elected, according to the said ancient custom, only one able and sufficient citizen and freeman, to be returned to the court of Mayor and aldermen, which person so elected shall be by them admitted and sworn.

A custom, proved to have existed from time immemorial till 1689, must be taken to exist still, if there be no further evidence proving or disproving its existence.

On an issue bringing into question the existence of the above custom of *London*, evidence was given of its exercise from an early period down to 1689; but no proof of its having been exercised, or interfered with, at any later time. The jury found, "That the custom existed to 1689."

Held that this was a verdict for defendants, who alleged the custom.

And that the Judge did rightly in ordering it to be so entered, and refusing to ask the jury whether it had existed after 1689.

(a) The substance of the return is stated in *Res v. The Mayor and Aldermen of London*, 3 B. & Ad. 255.

interested

1840.

—
 SCALES
 against
 KEY.

interested therein to the said court of mayor and aldermen holden as aforesaid, and also of examining and determining whether or not any person so returned to the said court of mayor and aldermen, as an alderman of any ward of the said city, was, according to the discretion and sound consciences of the mayor and aldermen of the said city for the time being, a fit and proper person duly qualified in that behalf, whensoever the fitness and qualification of the person so returned have been brought into question by the petition of any person interested therein to the said court of mayor and aldermen holden as aforesaid. There were other assignments of falsehood, not material here. Plea, Not guilty.

The cause was tried before Lord *Denman* C. J. at the sittings in *Middlesex* after *Trinity* term, 1834. The plaintiff's counsel, for the purpose of shewing that the custom in question, if it ever existed, had been abolished, put in a by-law of 13 *Ann.* (a), "for reviving the ancient manner of electing aldermen;" and they also

(a) See it partly set out in *Rex v. Johnson*, 5 *A. & E.* 488, 489. The by-law (proved on the present trial) recites the ancient custom as in 5 *A. & E.* 489; sets out certain acts and ordinances of common council varying the custom, particularly by ordering several persons to be elected, out of whom the mayor and aldermen are to chuse one; recites inconveniences; repeals the recited acts so far as they require several persons to be nominated; and then enacts that, for reviving the custom, and restoring &c., there shall, in all elections of aldermen at a wardmote &c., be elected according to the said ancient custom, by the householders of the ward, being freemen &c., only one able and sufficient citizen and freeman, not being an alderman, which person so elected shall be returned by the lord mayor, or other person authorized to hold such wardmote, to the court of mayor and aldermen, and shall be by them admitted and sworn &c. There are provisos, saving all former acts of common council as to the time of electing, or the method of taking polls and scrutinies or making returns, which are not by this or some former act repealed or altered; and exempting from this by-law the elections of aldermen for the ward of *Bridge* without.

relied

relied upon stat. 11 G. 1. c. 18., "for regulating elections within the city of *London*" &c. For the defendants, a course of documentary evidence was gone through, to shew the exercise of the custom down to 1689; and reference was made to stat. 2 W. & M. sess. 1. c. 8. s. 3., confirming the customs &c. of the city. The Lord Chief Justice left the case to the jury on the evidence, and stated as his opinion that the alleged custom, if it existed before 13 *Ann.*, was not altered, as to the power of approval or rejection, by the by-law of that year. The effect of stat. 11 G. 1. c. 18. he considered to be a question of law, which might be reserved, if necessary, for further inquiry. The jury found "That the custom did exist to 1689." The plaintiff's counsel then urged that the Lord Chief Justice should ask them whether the custom existed after that year; but his Lordship refused to do so, and directed the verdict to be entered for the defendant, giving leave to move that it might be entered for the plaintiff.

1840.

 SCALES
 against
 KEY.

Sir *James Scarlett*, in *Michaelmas* term, 1834, moved that such entry might be made, or a new trial had, on the grounds that the verdict was against evidence, and that the jury had been misdirected, on a point which it is unnecessary to state here. The rule was refused as to these last grounds, but, on the objection to the verdict, the Court granted a rule to shew cause why it should not be entered as a verdict for the plaintiff, or in the terms of the finding, or a new trial be had. But, a writ of error being afterwards brought by the plaintiff, in *Rex v. Johnson (a)*, involving the points upon which the present rule was granted, this case stood over. Judgment

(a) 5 A. & E. 488.

1840.

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 SCALES
 against
 KEY.

was given for the defendant in error, *Johnson*, in the Exchequer Chamber, in *Trinity* term 1836, and affirmed, on error, by the House of Lords, *February* 19th, 1839 (*a*).

The plaintiff in person now moved to make his rule absolute; and

Sir *J. Campbell*, Attorney General, *Law*, recorder of *London*, and *Bullock*, shewed cause, and relied upon the two judgments in the courts of error as expressly deciding the points now in question.

The plaintiff in person, *contra*, insisted on the effect of the by-law, and of stat. 11 G. 1. c. 18., and contended that a custom was not proved by shewing that it had existed until 1689. He cited *Rogers v. Allen* (*b*). [*Patteson J.* The only question before us is, whether the want of a finding by the jury as to the period since 1689 makes the verdict a verdict for plaintiff or for defendant.]

LITLEDALE J. I am of opinion that the Lord Chief Justice was right in refusing to put the question to the jury as to the existence of the custom since 1689. As the case comes before us, we must take it that the custom was properly found to have existed until that time. Then, as to the effect of any thing that may have occurred since; there are three ways in which the custom might be got rid of. First, by act of parliament. Secondly, according to the constitution of the city of *London*, by act of the common council. Thirdly, if there were acts shewn to have been done since 1689,

(a) *Rez v. Johnson*, 1 *Macl. & Rob.* 1.

(b) 1 *Campb.* 309.

sometimes

sometimes according to the custom, and sometimes contrary to it, that would be evidence for a jury that the custom had not existed down to the present period. That has not been shewn here; and the custom is not to be destroyed because there are no instances of the practice since 1689. The by-law of 13 *Ann.* brings back the ancient practice of electing one alderman, as it existed down to the time of *Richard II.*, but has nothing to do with this question; for the custom of inquiry by the mayor and aldermen into the fitness of the party chosen takes effect only after the election. The provisions of stat. 11 *G. 1. c. 18.*, so far as they bear on this subject, relate merely to the mode of conducting the elections. Independently of any prior decision, I should have said that the by-law and statute had nothing to do with this question; but the decisions of two courts of error are likewise to this effect. Mere non-user cannot affect a custom, where the question, whether it should be put in force or not, does not appear to have arisen. If there had been determinations, sometimes one way and sometimes another, on the course to be pursued in this respect, it would have been a question for the jury whether the custom still subsisted; but in this case there were no facts, after 1689, for the jury to take into consideration. It was matter of law that the verdict should be entered as the Lord Chief Justice here directed it.

PATTESON J. The issue in this case was, in effect, whether the custom alleged in the return had existed, and still did exist. The jury found that it had existed down to 1689, but they did not say, in terms, that it had existed or had been abolished since. The Lord Chief

1840.

 Scales
against
Key.

1840.

SCALES
against
KEY.

Justice treated the by-law of 13 *Ann.* as not affecting the custom; and, the jury having found the existence of the custom from time immemorial until 1689, he directed the verdict to be entered for the defendant, as a matter of law. Sir *James Scarlett* moved for a new trial on account of misdirection on a point not now before the Court, and on the ground that the verdict was against evidence. He also moved that the verdict should be entered for the plaintiff, because that was the effect of the finding; or at least that it should be entered in the terms of the finding. No mention was made of the custom being good or bad in law; that was on the record. We cannot enter into the first two grounds of motion; though I do not depart from the opinion I entertained, that the verdict was supported by the evidence, and that there was no misdirection. The only question is, whether the finding is or is not substantially for the plaintiff. The case has stood over a considerable time: the same question has been raised on the record in *Rex v. Johnson (a)* by a bill of exceptions, and decided by the Court of Exchequer Chamber, whose judgment has been affirmed by the House of Lords. We have scarcely power to enter upon the question; though we must take notice of it, having granted the present rule. The custom in dispute here relates to what shall be done after, not at, the election of an alderman. The by-law affects only the mode of election, and directs that, in future, only one alderman shall be elected: the custom is consistent with the return of one, two, three, or more. I think, therefore, that the by-law cannot have the operation contended for by the plaintiff. Then the only question

(a) 5 *A. & E.* 488., 1 *Macl. & Rob.* 1.

is,

is, whether, if a custom has existed from a remote period till 1689, and there is no evidence to shew its abolition, it must not be taken to exist still. I think it must, and that the finding here is for the defendant; clearly not for the plaintiff. As to entering the verdict in the terms of the finding, if facts are stated by the jury to raise a question of law on the record, that is a special verdict: but it does not follow, merely because a jury chuse to return their verdict only in particular words, instead of saying aye or no, that the verdict is a special one. Here it is as if, on an indictment for larceny, they found that the prisoner did not steal, instead of saying Not guilty. Upon the main points of the case, even if I entertained a doubt, which I do not, the House of Lords has given a decision by which we are bound.

1840.

 SCALES
against
KEY.

COLERIDGE J. There is no arguable point before us. The question has already been decided by the House of Lords; and I do not think it is open to us to discuss it at any length.

LORD DENMAN C. J. I think we were in fault in allowing this matter to be heard; for it was kept open only to await the result of the cases in error. As to the effect of stat. 11 G. 1. c. 18., *Rex v. The Mayor of London* (a) (*Alderman Winchester's case*) shews that the custom, as it regards the right claimed by the Court of mayor and aldermen to examine into elections, is not affected by that statute. The finding of the jury, that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last

(a) 9 B. & C. 1.

1840.

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 SCALES
against
 KEY.

week, unless something appeared to shew that it had been legally abolished.

Rule discharged.

Saturday,
May 3d.

The QUEEN *against* The Mayor, Aldermen, and Burgesses of the Borough of NEWBURY.

This case is reported, 10 *A. & E.* 386.

Monday,
May 4th.

COLLS and Others *against* COATES.

The sheriff is not entitled to poundage on a *fi. fa.* unless there has been a levy. Accordingly, where, after the sheriff had received the writ, but before execution, defendant, to stop execution, offered the sheriff to pay the money for which the writ issued, and the sheriff refused to receive it without poundage, which defendant paid under protest; the Court, on motion, ordered the sheriff to refund the poundage.

THIS was an action of assumpsit, in which judgment was recorded against the defendant, and a *testatum fi. fa.* issued for 514*l.* 11*s.* 8*d.* and interest, directed to the chancellor of the county palatine of *Lancaster* or his deputy. The defendant's agent, after the under-sheriff in *Lancashire* had received the writ, but before he had taken any steps to execute it, offered the money to the under-sheriff, and requested him not to levy: the under-sheriff stated that he should demand also the fee to which he would have been intitled if the chancellor's mandate had been issued, and poundage. The defendant's agent assented to pay the fee on the *m a date*, but not the poundage; but, the under-sheriff refusing to receive the money without the poundage, the agent paid the poundage with the other sum under protest. No levy took place. On affidavit of these facts, *Wightman*, in last *Michaelmas* term, obtained a rule calling on the sheriff to shew cause why he should not return the poundage.

Crompton

Crompton now shewed cause. The sheriff is entitled to the poundage wherever recourse has been had to him to obtain the money. Here the money was paid to him to stop the execution; and he received it for that purpose. In *Alchin v. Wells* (a) a compromise took place while the sheriff was in possession, but before sale; and it was held that he was entitled to poundage. If this proceeding be extortionate, the sheriff is liable to an action: but he has forborne to levy, at the defendant's request.

1840.

 COLLS
against
COATES.

Wightman, contrâ. In *Alchin v. Wells* (a) there was a levy, which entitled the sheriff to poundage (b). In an *Anonymous* (c) case in *Lofft*, it is said: "It seems, on enquiry into the practice, the sheriff cannot have poundage till the goods are sold." In *Rawstorne v. Wilkinson* (d) the judgment and execution were set aside for irregularity; but, as there had been a levy, the sheriff was allowed poundage, though he had, with the execution creditor's consent, paid back money which he had received on the execution. Here no levy took place.

LORD DENMAN C. J. In *Com. Dig. Viscount*, (F 2.), it is said that the "sheriff may retain for his poundage, tho' there is no actual levy;" for which he cites *Rex v. Jetherell* (e). But stat. 29 *Eliz. c. 4.* gives poundage

(a) 5 T. R. 470.

(b) Stat. 29 *Eliz. c. 4. s. 1.*(c) *Lofft*, 493.

(d) 4 M. & S. 256.

(e) *Parker*, 177. That was an actual seizure under an extent in aid; and the money was paid (without sale) to the sheriff who had seized. Stat. 3 G. 1. c. 15. s. 3. gives poundage, for executions on behalf of the Crown, only in case of a levy: but the Court said that the money here might be considered as levied or collected, within the very words of the third section. See *Drewe v. Lainson*, *antè*, p. 529.

1840.

 COLLs
 against
 COATES.

in the case of a levy only. Here, as the sheriff has not levied or collected, he has no claim for poundage.

LITLEDALE J. On the whole, I am of opinion that, where the sheriff has not levied, he has no claim for poundage.

PATTESON J. concurred.

COLERIDGE J. The right of the sheriff arises from his executing: there is no execution where there is no levy. In *Graham v. Grill* (a) the sheriff had seized property under a *capias utlagatum*, and taken an inquisition thereon; the outlawry was reversed before there had been any *venditioni exponas*; and the sheriff was not allowed poundage. There Lord *Ellenborough* said, "Is there not this difficulty here, that there has been no levy of the money, and therefore supposing a *capias utlagatum* to come within the words extent or execution in the statute of *Eliz.*, must not the money be levied in order to entitle the sheriff? The right of the sheriff to poundage is a right merely *positivi juris*, and unless expressly conferred by the act of parliament, he cannot claim it."

Rule absolute (b).

(a) 2 M. & S. 294.

(b) See 2 *Tidd's Pr.* 1039, 1040. (9th ed.).

1840.

SAVORY, Assignee of the Estate of DAVIE, a *Tuesday,*
Bankrupt, *against* CHAPMAN, Esquire. *May 5th.*

DEBT against the marshal of the Queen's Bench for permitting the escape of *Edmund Cresswell*, who was committed to defendant's custody in execution, before *Davie's* bankruptcy, for damages before then recovered against him by *Davie*. The declaration, after stating the commitment, alleged that, by virtue thereof, defendant, so being marshal &c., kept and detained *E. C.* in execution for the damages so recovered by *Davie*, who afterwards, viz. on &c., became bankrupt, and plaintiff thereupon afterwards, and before the commencement of this suit, viz. on &c., was duly chosen and appointed assignee of the estate and effects of *Davie*, until defendant, so being such marshal, not regarding the duty of his said office &c., afterwards, and before the commencement of this suit, viz. on &c., freely and voluntarily suffered and permitted *E. C.* to escape and go at large &c., and out of defendant's said custody &c., without the licence and against the will of plaintiff, so being assignee &c.; the said *Davie* up to the time of his bankruptcy, and plaintiff as assignee, then and still, being wholly unpaid the said damages &c.

Third plea. That one *William Wilmot*, being retained and employed by the said *J. C. Davie* as his attorney as aforesaid in that behalf, acted as such attorney as aforesaid in prosecuting and conducting the said action in the declaration mentioned against the said *Edmund Cresswell*, and in procuring the said commitment of the said

In an action against the marshal for permitting the escape of a party imprisoned in execution, it is not sufficient to plead that the attorney for the plaintiff at whose suit the party was imprisoned did, as such attorney, require and license the marshal to discharge the prisoner. The plea ought to shew either that the plaintiff had given express authority for the discharge, or that the amount for which the execution issued had been paid to him or his attorney.

Quere, whether a plea in the latter form would justify the marshal, if the plaintiff suing out execution had become bankrupt between the commitment and the order to discharge, and an action of escape were brought by his assignee.

E. C.

1840.

SAVOY
against
CHAPMAN.

E. C. as in the declaration mentioned, he, the said *W. Wilmot*, during all the time last aforesaid being an attorney of the said court of &c., having been the only attorney in prosecuting and conducting the said action, and his authority as such attorney never having been revoked; and that, after the commitment of the said *E. C.* as in the declaration mentioned, and before the said *E. C.* was permitted to go at large &c., as in the declaration mentioned, and before defendant had notice or knowledge that the said *J. C. Davie* had become a bankrupt as in the declaration mentioned, viz. on &c., the said *W. Wilmot*, so being and continuing such attorney of the said *J. C. Davie* as aforesaid, and as such attorney, did require and direct defendant that he should forthwith discharge the said *E. C.* out of custody as to the said action, and, as such attorney as aforesaid, did give licence to defendant to discharge the said *E. C.* out of the custody of defendant as to the said action, and to permit and suffer him to go at large out of the said prison and out of the custody of defendant wheresoever he would, and without restraint; and thereupon, and before defendant had notice or knowledge that the said *J. C. Davie* had become bankrupt, and in pursuance of the said requirement and direction as aforesaid, defendant did discharge the said *E. C.* out of his said custody as to the said action, and did suffer and permit the said *E. C.* to go at large &c., as he lawfully &c.; which is the said escape in the declaration complained of. Verification.

To this plea there was a replication, which was specially demurred to; and the plaintiff joined in demurrer. As the argument and judgment turned wholly on the plea, no further statement is necessary.

Sir

Sir *J. Campbell*, Attorney General, for the defendant. The important question will be, whether or not the plea shews a legal defence. The attorney had the same power to receive the money due in the action, and grant a discharge, as the bankrupt had. Then at what period does the discharge of a debtor by order of the attorney or bankrupt, in a case like this, become illegal? The plaintiff must argue that it would be so even before fiat issued, if the creditor had committed an act of bankruptcy, and that the marshal, or even the sheriff of a remote county, must inquire into this before he discharges the debtor from custody. The action here is, in form, debt; but the foundation of it is breach of duty: the statutes, 1 stat. 13 *Ed. 1.* (*Westm. 2.*) c. 11., and 1 *R. 2.* c. 12., which authorise the writ of debt, do not change the ground of action, which is the same as in actions on the case, namely, a breach of duty by the officer, and a resulting damage. The principle on which actions of this kind proceed is laid down in *Whitelegg v. Richards* (a), and illustrated in the argument by many authorities. Now, in the present case, there was no breach of duty; the marshal would have been liable to an action of false imprisonment if he had detained the party after being ordered to discharge him by the plaintiff who sued out execution; *Withers v. Henly* (b): and *Crozer v. Pilling* (c) shews that the attorney's order to discharge would be equivalent to that of the plaintiff; though, on the other hand, the attorney's order to detain would not authorise the sheriff or marshal in so doing, where the plaintiff directed him to discharge; *Martin v. Francis* (d). The attorney's warrant to pro-

1840.

 SAVORY
 against
 CHAPMAN.
(a) 2 *B. & C.* 45.(b) 3 *Bulst.* 96.(c) 4 *B. & C.* 26.(d) 2 *B. & Ald.* 402.

secute

1840.

SAVORY
against
CHAPMAN.

secute the action continues in force (unless countermanded by his death or the act of the principal) for a year and a day after the judgment, *for the purpose of having execution*; 1 *Tidd's Pract.* 93. (a), citing 2 *Inst.* 378., *Gillb. Law of Executions*, 92, 3. Here, therefore, *Wilnot* stood in the same situation as the plaintiff himself, who might at any time have discharged the prisoner. The duty of a sheriff executing a ca. sa. is, as stated by Lord *Ellenborough* in *Slackford v. Austen* (b), to "pursue the writ and be ready at the day, not with the money, but with the body, unless the party himself, who sued out the writ, interfere and agree to the liberation of the prisoner upon receipt of the money." It would then have been a breach of duty in the marshal (no bankruptcy intervening), if he had not discharged the debtor when ordered by *Wilnot*: refusal would have subjected him to an action; and it cannot be said that liability to an action for refusing or for complying shall depend on the contingency of a fiat having issued when the order to discharge is received.

R. V. Richards contra. The argument for the defendant merely shews a case of hardship, many of which necessarily occur under the bankrupt laws. The plea states that *Wilnot* had been the attorney employed in prosecuting the action and procuring the commitment; but it does not shew any circumstance authorizing him to order the discharge. There is no doubt that the plaintiff himself might have done so, if he had not become bankrupt; but the attorney's authority determined with the judgment; *Tipping v. Johnson* (c): he

(a) 9th ed.

(b) 14 *East*, 468.(c) 2 *B. & P.* 357.

could

could not afterwards release the damages, though he might, on payment, have entered satisfaction on the record; *Com. Dig. Attorney*, (B 10.). The plea here asserts a right in the attorney simply to discharge the debtor out of execution, without the client's concurrence. But, further, the plaintiff here having become bankrupt, the question is whether the attorney had any authority to do that which the bankrupt himself could not do. Where a party in execution is once rightfully discharged, the debt is gone. Here the debt had passed at once to the assignee, on the plaintiff being adjudged bankrupt, by stat. 1 & 2 W. 4. c. 56. s. 25.; and the assignee was entitled to hold the body of the debtor as a security. [Coleridge J. Suppose the plea had stated, instead of the order to discharge, a payment to the bankrupt or his attorney.] The marshal would still have been liable. But there at least the payment to the plaintiff on the record would have been correct. [Littledale J. *Crozer v. Pilling* (a) seems to shew that in discharging the debtor on payment the attorney has still something to do.] The attorney there was a proper agent to receive the money; and upon tender he joined the plaintiff in a refusal to discharge. The present case is analogous to those (as *Cooper v. Chitty* (b)), where a sheriff has been held liable for selling goods, the property in which was changed by a prior act of bankruptcy. [Coleridge J. There the sheriff is divested of his official protection under the writ, and is a trespasser, if he takes goods which are not those of the party named in the writ. Here the question is whether the marshal, acting as a public officer, is chargeable with a breach of duty.] The body of the debtor, in

1840.

 SAVORY
 against
 CHAPMAN.

(a) 4 B. & C. 26.

(b) 1 Burr. 20.

this

1840.

 SAVORY
 against
 CHAPMAN.

this case, represented the debt; the plaintiff, after bankruptcy, had no right to deal with the debt; and a third person was bound to take notice of that disability. And the attorney could no more interfere with the debt than his client. If bankruptcy revokes a submission to arbitration, which it was considered to do in *Ex parte Kemshead* (a), it may well revoke the authority of an attorney. It is said on the other side that the action for an escape is, in its nature, an action of tort for breach of duty: but that view of it is inconsistent with the dictum of *Holt* C. J. in *Berwick v. Andrews* (b), that "an executor may maintain an action on the case at the common law for an escape out of execution in the time of the testator."

Sir *J. Campbell*, Attorney General, in reply. The argument for the plaintiff goes this length, that, although the debt and costs had been paid, and a regular discharge given, reciting that the plaintiff had received them, yet, if he had committed a secret act of bankruptcy, the marshal would be liable for an escape if he let the prisoner out of custody. [*Littledale* J. Is not the issuing of the commission notice of the act of bankruptcy?] It is, for the purpose of rendering transactions valid or otherwise under particular provisions of the statute; but not for the purpose of affecting a public officer with liability. Supposing that, after judgment, an attorney cannot release damages, he may receive payment and give a discharge; and *Crozer v. Pilling* (c) shews that he is bound to do so. It is said, in *Payne*

(a) 1 *Rose's Ca. Bank.* 149. See *Marsh v. Wood*, 9 B. & C. 659.

(b) 2 *Ld. Ray.* 971. 973. "It lieth not against the gaoler's executors, because it is a trespass." 2 *Inst.* 382.

(c) 4 B. & C. 26.

v. Chute (a), that an attorney, after judgment, may acknowledge satisfaction on the record without a new warrant: if so, he may give a discharge; and it cannot be necessary that the discharge should recite the fact of payment. It is contended that the marshal, by letting the debtor go after the creditor's bankruptcy, deprived the assignee of something which had vested in him, and over which neither the bankrupt nor the marshal had any right to exercise authority. But the marshal did not, by that discharge, exercise authority over any property. The body of the debtor is not property, but is detained to compel payment (b); the question is, not whether a party has disposed of effects which belong to another, but whether a public officer has done an act which makes him liable, in that character, for a breach of duty. This is not like the case of a sheriff who becomes a wrongdoer because he has seized goods which do not belong to the defendant named in the writ. It is indeed laid down in *Berwick v. Andrews* (c) that an executor may sue for an escape in the time of his testator; but the creditor's action against the sheriff is, in substance, an action ex delicto, though the result of the misfeasance be to make the sheriff debtor, according to the statutes, *Westm. 2. c. 11.* and *1 R. 2. c. 12.*

LORD DENMAN C. J. I am of opinion that the plea does not shew enough to relieve the marshal from liability. The whole statement in the plea is, that the plaintiff's attorney required the defendant to discharge *Cresswell* out of custody as to the action: there is no averment that the money was paid, or the discharge authorized by the plaintiff. If the defence rests on

(a) 1 *Roll. Rep.* 365.

(b) See *Williams v. Grey*, 1 *Ld. Ray.* 40. 41.

(c) 2 *Ld. Ray.* 971.

1840.

SAVORY
against
CHAFMAN.

actual

1840.

 SAVORY
 against
 CHAPMAN.

actual authority from the plaintiff, none is shewn ; if on the power of an attorney to discharge on satisfaction of the debt, the defence fails on that ground also. The case is unfortunate for the marshal : but, if the facts here pleaded were a complete justification, a creditor would lose his proper recourse against the body of his debtor. It was argued that, if the marshal had refused to discharge, an action of false imprisonment would have lain against him ; but that is only altering the question in form. If it appeared in such an action that the money had not been paid, and that the creditor had not given authority for the discharge, or had countermanded it, the action would fail.

LITLEDALE J. The authority of an attorney in general is determined after judgment, but he may still sue out execution and receive the money, and his receipt is then the same as that of the principal ; and, according to 1 *Roll. Abr.* 291., tit. *Attorney*, (M), cited in *Com. Dig. Attorney* (B 10), he may, after judgment, acknowledge satisfaction on the record. But here it is merely alleged that the attorney ordered the debtor to be discharged, without averring that the money was paid either to the attorney or to the plaintiff. The mere fact that the party ordering was the plaintiff's attorney is not sufficient to warrant such a discharge. If he had had the plaintiff's authority for it, that might have been pleaded : but, as no such authority appears, and it is not alleged that the money was received, I think the plea shews no defence.

PATTESON J. It is not necessary to consider the effect of the bankruptcy, but only the right of the attorney

torney to discharge. It is clear that the attorney could not, of his own authority, without payment, discharge the defendant out of custody as a matter of indulgence: nor indeed is it contended that he could. Either the money must have been actually paid, or the plaintiff must have chosen to shew favour; that would be his act. The plea does not allege either fact. It is true that, if the attorney has power to receive the money, he may, having received it, order a discharge; but then, in pleading the discharge, it should be shewn that the money was paid. So, if the plaintiff chose to dispense with the further detention, it should have been alleged that he authorised the attorney to discharge. It cannot be contended that, even if the attorney had a general power to release the debtor from custody, the creditor might not have forbidden it; and, consistently with this plea, he may have done so. I therefore think (without resorting to the bankruptcy) that no proper authority is shewn in the attorney. *Holroyd J.*, in *Crozer v. Pilling (a)*, says that "the sheriff," "for his own security, before he discharges a prisoner, is entitled to know from the plaintiff that the debt has been satisfied, or that the defendant has done all that the law requires of him in order to satisfy the debt." That seems to imply that the marshal, in a case like this, might detain the prisoner till he knew that the plaintiff had been satisfied.

1840.

SAVORY
against
CHAPMAN.

COLERIDGE J. The justification here is merely a discharge by the attorney on his own authority, no payment or special authority from the plaintiff being averred. One circumstance which weighed with me at first was, that the action was against a public officer;

(a) 4 B. & C. 26. 33.

1840.

SAVORY
against
CHAPMAN.

and it is true that such an officer is not to be made liable by his ignorance of particular facts: but he is bound to know the legal qualification of persons filling certain employments. The question, therefore, turns on the authority of the attorney; and there is nothing here to shew that he had any, either in his general character, or with reference to the circumstances of the suit. He could, as it appears here, be only an agent *de facto*; and there is nothing shewn to make him one for the present purpose. It seems that the only person who is plaintiff on this record could have given him no authority at all.

Judgment for plaintiff.

Tuesday,
May 5th.

FREND *against* BUTTERFIELD.

In a *qui tam* action under stat. 1 & 2 *W. 4. c. lxxvi. s. 57.*, for delivering coals short of weight, the declaration must aver that the coals were carried, for delivery, from a ship, wharf, &c., or place in *London* or *Westminster*, or within twenty five miles of the General Post office in *London*. It is not sufficient to allege that they were sold and delivered at such place. So held on general demurrer.

DEBT by plaintiff, *qui tam* &c., for 50*l.* penalties under stat. 1 & 2 *W. 4. c. lxxvi.*, local and personal, public (a), ss. 57, 85. (b). The declaration stated that defendant

(a) "For regulating the vend and delivery of coals in the cities of *London* and *Westminster*, and in certain parts of the counties of *Middlesex*, *Surrey*, *Kent*, *Essex*, *Hertfordshire*, *Buckinghamshire*, and *Berkshire*."

(b) Sect. 43 enacts, "That all coals, cinders, and culm which shall be sold from and out of any ship or vessel in the port of *London*, or at any place within the cities of *London* and *Westminster*, or within the distance of twenty-five miles from the General Post Office in the city of *London* shall be sold by weight, and not by measure."

Sect. 48 enacts, "That all coals sold from any lighter, barge, or other craft, or from any wharf, warehouse, or other place within the cities of *London* and *Westminster*, or within the distance of twenty-five miles from the Post office aforesaid, in any quantity exceeding 560 pounds, except coals carried and delivered in bulk as hereinafter mentioned, shall be carried and delivered to the respective purchasers thereof in sacks, each sack containing either 112 pounds, or 224 pounds net."

Sect. 54 enacts, "That the carman or driver of any cart, waggon, or other carriage in which coals shall be carried in sacks for delivery to the purchaser

fendant "did sell and deliver to one *J. P.*, at a certain place called and known as *White's Alley, Chancery Lane*, situate and being in the Liberty of the Rolls, in the county of *Middlesex*, and being within the distance of twenty

1840.

FREND
against
BUTTERFIELD.

purchaser or purchasers thereof, from any ship, lighter, barge, or other craft, or from any wharf, warehouse, or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, shall and he is hereby directed to weigh, if he shall be required so to do, any one or more of the sacks contained in any such cart, waggon, or other carriage, which may be chosen by the purchaser or purchasers of the said coals, or his, her, or their servant or servants, or other person or persons acting on the behalf of such purchaser or purchasers, with the coals therein, and also afterwards to weigh in like manner such sack without any coals therein."

Sect. 55 imposes penalties on the carman or driver of any cart, &c., in which coals shall be carried for delivery to the purchaser, from any ship &c. (as in sect. 54, to "post office aforesaid"), if he shall neglect or refuse to weigh &c.

Sect. 56 enacts, That if any purchaser, or his servant &c., who shall require any sack or sacks of coals to be weighed as aforesaid, shall find the coals therein deficient in weight, and shall signify to the carman or other person &c. his desire to have all the coals, or any part, weighed in the presence of some constable, police officer, or other indifferent and credible person, the carman &c. shall continue at or before the purchaser's premises with such coals and the cart &c., till such coals are weighed.

Sect. 57 enacts, That the purchaser, his servant &c., so desiring such coals to be weighed, shall, and he is required to procure the attendance of some constable, police officer, or other indifferent and credible person, to be present at the weighing, and all the sacks, both with and without the coals therein, shall be weighed by the carman or other person attending such cart &c., in the presence of the purchaser or his agent or servant, if they shall attend, and of such constable, police officer, or other person; and if the purchaser, his agent &c., shall not attend, such carman &c. shall weigh in their absence (penalty on refusal or neglect); and the constable, police officer, or any other person present, may weigh as aforesaid: "and in case upon the weighing of any such sack it shall happen that any sack or sacks shall not contain either 112 pounds or 224 pounds net of coals, as the case may be, then and in every such case the seller or sellers of such coals shall for every such sack of coals that shall be so found deficient forfeit and pay any sum not exceeding 5*l*."

Sect. 85 gives the action of debt, *qui tam*, for forfeitures, &c., exceeding 25*l*.

Some other sections were referred to in argument, which it is unnecessary to set out.

1840.

—
FRIEND
against
BUTTERFIELD.

five miles from the General Post Office, in the city of *London*," a sack of coals, and did then assert that the same contained 224 lbs. net of coals: that "the said sack and the said coals then contained therein were then duly weighed, according to the form of the statute in such case made and provided, in the presence of a certain indifferent person, to wit one *C. J.*:" and that the said sack did not then contain 224 lbs. net of coals, but was deficient of that weight to a great extent, to wit &c., contrary to the form of the statute, whereby and by force &c. defendant forfeited 5*l.* There were other counts in the same form. General demurrer and joinder. The point for argument stated in the margin of the paper book was, "that the declaration and the several counts thereof do not allege any matters which constitute an offence within the statute therein mentioned."

Martin for the defendant. The declaration is bad, because it does not state that the coals were *carried from* any ship &c., or place within *London* or *Westminster*, or within twenty five miles of the Post-office; but only that they were *sold and delivered at* a place within that distance. The penalty attaches in respect of coals carried *from* the places pointed out, in *London* and *Westminster*, or within the specified distance: this is evident on examination of the clauses bearing on the subject which precede sect. 57. Why the legislature made this provision it is unnecessary to inquire, the words being positive. (He then referred to sects. 43, 44, 47, 50, 54, 55, and 56.) [Lord *Denman* C. J. May not the words in sect. 54, "within the cities" &c., "or within the distance of twenty-five miles from the post office," be referred to the previous words, "for delivery

delivery to the purchaser or purchasers?"] In reasonable construction, they must relate to the words immediately preceding. Another objection is, that the coals are not stated to have been weighed in the presence of an indifferent *and credible* person.

1840.

FRIEND
against
BUTTERFIELD.

Peacock, contra. The last objection is not pointed out in the margin of the paper-book. [Lord *Denman* C. J. It is stated there that the declaration does not allege any matters which constitute an offence within the statute. All ingredients of the offence are material; and therefore I think the objection is let in.] As to the principal point, the object of the statute is to prevent frauds in the vending of coals within certain limits. It is immaterial whence they come; and several clauses of the act, where it is evident that no distinct regulation on this subject is contemplated, speak merely of a "sale" or "delivery" "at any place within the cities of *London* and *Westminster*, or within the distance of twenty five miles from the Post office aforesaid;" or use equivalent words. This is so in sects. 44 and 48, and also in sect. 45; and sect. 47, which is meant to enforce the provisions of sect. 45, adopts the form of words, "delivered from any lighter," &c., "or from any wharf, warehouse, or other place, within the cities" &c., "or within the distance" &c. The only point really contemplated as material is that the delivery, and transactions attending it, should be within twenty five miles of the Post office. [*Patteson* J. Then, in sects. 54 and 55, "*from* any wharf, warehouse, or other place," must be read "*at* any warehouse," &c. Lord *Denman* C. J. Sect. 43 gives the form which should have been used according to your view.]

1840. *Per Curiam* (a). The express words cannot be got over.

FRIEND
against
BUTTERFIELD.

Judgment for the defendant.

(a) Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

DOE on the demises of SARAH BLIGHT and Others *against* WILLIAM PETT.

M., after a devise of his property real and personal to *P.*, purchased lands in fee, and procured an assignment of an outstanding term of years to *P.* as his trustee. On the death of *M.* without republishing his will, a moiety of the fee descended to *P.*'s wife as coparcener with others; but *P.*, thinking himself entitled under the will, entered into, and took the profits of, the whole to his own use, and afterwards joined his wife in a feoffment and fine sur cognizance de droit come ceo, with proclamations: Held,

EJECTMENT for an estate called *Berry Parks* and *Verkastastable*, in the parish of *Shebbear* in the county of *Decon*, on several demises laid upon the 2d January 1838; namely, first, on the joint demise of *Sarah Blight*, *William Hockin Braund*, *Samuel Bonifant* and *Elizabeth* his wife, and *Lewis Braund* and *Frances* his wife; secondly, on the joint demise of *Sarah Blight*, *William Hockin Braund* the younger, *Samuel Bonifant* and *Elizabeth* his wife, and *Lewis Braund* and *Frances* his wife; thirdly, on the separate demise of *Samuel Bonifant*.

On the trial, before Lord Denman C. J. at the *Deconshire* Spring assizes, 1838, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

That the term was not merged by the seisin of *P.* in right of his wife:

That the feoffment and fine were not void, but operated as a disseisin and forfeiture of the term, of which advantage might be taken by entry within five years, either after forfeiture or after the expiration of the term:

That, in the mean time, the term might be treated as still subsisting for the purpose of entitling a plaintiff in ejectment to recover on a demise by *P.*'s personal representative.

A joint demise in ejectment cannot be supported as the several demise of one or more of the lessors whose title is proved at the trial: therefore, where the demise is by one parcener jointly with another parcener and her husband, whose title, *jure uxoris*, is barred by fine and nonclaim, there cannot be a verdict for the plaintiff.

Per Patteson J. An entry to avoid a fine with proclamations, though not authorised by the party in whose behalf it was made, is sufficiently ratified by an action of ejectment founded on it.

In

In 1804, *James Millman*, having then no interest in the premises in dispute, made his will, whereby, after certain devises and legacies, he devised the residue of his property real and personal to his brother in law *William Pett*, the father of the defendant. In 1814, *James Millman* purchased the above premises, which were conveyed to him by lease and release dated 22d and 29d August 1814. The release contained also an assignment to the said *William Pett*, the father, of an outstanding term of 500 years, created in the year 1793, to hold to the said *William Pett*, his executors, &c., in trust for the said *James Millman*, his heirs, &c. The release was executed by *James Millman*; but *Pett*, the father, neither executed the release nor disclaimed the term. *James Millman* had two sisters, of whom one was *Mary*, the wife of the said *William Pett*, and mother of the defendant, who survived her brother *James Millman*. The other was *Ann Perkin*, who died in the lifetime of her brother, leaving four daughters, viz., *Sarah*, the wife of *William Blight*, deceased; *Elizabeth*, the wife of *Samuel Bonifant*; *Frances*, the wife of *Lewis Braund*, all being lessors of the plaintiff; and *Mary*, late wife of *William Hockin Braund* a lessor of the plaintiff, and mother of *William Hockin Braund* the younger, another lessor of the plaintiff.

In 1820 the said *James Millman*, being seised in fee of the premises in question, died without issue and without having altered or republished the will of 1804, and without having made any new will, leaving *Mary Pett* and his said four nieces his co-heirs at law. On the death of *James Millman*, his will was duly proved by *William Pett*, the father, who immediately entered into possession of the whole of the premises, and received the

1840.

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Dox dem.
Blight
against
Pett.

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1840.

Dox dem.
Blight
against
Pett.

rents thereof, rendering no account of any of such rents or profits to any of the said coparceners, and considering himself to be entitled under the will. On 29th *August* 1823, *William Pett* the father and *Mary Pett* his wife enfeoffed *Joseph Risdon* of the premises to such uses as the said *W. Pett* should appoint, and gave him livery of seisin. A fine sur conuizance de droit come ceo, with proclamations, was afterwards levied, between *Risdon* plaintiff, and *William Pett* and *Mary* his wife deforciant, of the said premises, before certain commissioners appointed by commission dated 8th *September*, 4 G. 4., returnable from the day of the holy Trinity in three weeks.

At the time of the death of *James Millman* and of the making of the feoffment and the levying of the fine, the four nieces of *James Millman* were under coverture. *Mary Braund* died in 1836, leaving her husband *William Hockin Braund*, and also *William Hockin Braund* the younger her son and heir, surviving. *William Blight*, the husband of the said *Sarah Blight*, died in 1837. The coverture of the two other nieces still subsists.

On 5th *June* 1828, *William Pett* the father, having continued in the sole possession of the premises to that period, died, having first made his will, whereby he devised them to his son, the present defendant, for life (who thereupon entered and has ever since continued in possession), with remainder to his grandson in fee; and appointed his wife, *Mary Pett*, executrix, who proved the will in *July* following in the archdeaconry court of *Barnstaple*. On 6th *February* 1837 *Mary Pett* died intestate, whereupon administration of her goods was granted to the defendant. On 15th *November* 1837, administration of the unadministered goods
of

of the said *William Pett*, the father, was granted to *Samuel Bonifant*.

1840.

DOE dem.
BLIGHT
against
PETT.

On 1st *January* 1838, *Samuel Bonifant* made an actual entry upon the premises in question, claiming and demanding the same on behalf of himself and his wife, of the said *Sarah Blight*, of the said *William Hockin Braund*, of the said *Lewis Braund* and *Frances* his wife, and of the said *William Hockin Braund* the younger, and stating that he made that entry also for the purpose of avoiding all fines.

The questions for the opinion of the Court were —

1. Whether the term of 500 years, or a moiety thereof, vested in *Bonifant* by virtue of the grant of administration de bonis non of *William Pett* the father?

2. Whether the term of 500 years, or a moiety thereof, merged in the freehold and inheritance which descended to *Mary Pett*, and of which the said *William Pett*, the father, and *Mary Pett* were seised in her right?

3. Whether the term of 500 years was destroyed by the feoffment and fine?

4. Whether the feoffment made by *Pett* and wife was or was not void?

5. Whether the fine levied to *Risdon* was or was not void?

6. Whether, notwithstanding the coverture of the four nieces of *Millman*, the right of entry of the lessors of the plaintiff, or of any of them, was barred by the feoffment and fine?

7. Whether by the entry made by *Bonifant* the operation of the fine was avoided in the whole or in part?

8. Whether the demises were properly laid in the declaration?

Should

1840.

—
Dox dem.
Blight
against
Pett.

Should the Court be of opinion that the plaintiff was entitled to recover the entirety of the premises, or the moiety, or any other purparty thereof under any of the said three demises, a verdict was to be entered accordingly; otherwise a nonsuit to be entered.

At the sittings in banc in last *Michaelmas* (a) vacation, the case was argued by

Manning, for the plaintiff. The term of 500 years is in existence and was not merged by the descent of a moiety of the inheritance upon the wife of *William Pett*, the assignee of the term. *The Lady Platt v. Sleep* (b) is a decision expressly in point. So in *Bracebridge v. Cook* (c) it was held that the wife's term would not be merged by marriage with the owner of the fee simple. It is not indeed expressly found that *W. Pett* accepted the assignment: but in the case of goods and chattels, "if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently before notice or agreement, but the donee may make refusal in pais, and by that the property and interest will be divested;" *Butler and Baker's Case* (d): *Sheppard's Touchstone*, p. 285., is to the same effect. But it will be contended that the feoffment and fine by *W. Pett* and his wife destroyed the term. The answer is, that a feoffment and fine by tenant for years under such circumstances are fraudulent and void; *Fermor's Case* (e). In that case, indeed,

(a) November 30, 1839. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) Cro. Jac. 275. S. C. 1 Bulstr. 118.; see also Jenk. 2 Cent., case 38. p. 73. (2d ed.)

(c) Plowd. 418.

(d) 3 Rep. 26 b, 27 a.

(e) 3 Rep. 77 a.

the

the tenant for years continued to pay rent to his lord after the fine levied, which was an additional badge of fraud; but that fact was not relied upon by the Court; nor was it the ground of the judgment. *Whaley v. Tancred* (a) confirms *Fermor's Case* (b), and shews that the very act of feoffment by a termor constitutes the fraud, and that additional circumstances of fraud are not material. It also points out a distinction between a disseisin of the termor by a third party, who may thereby gain a perfect title after five years, and a disseisin and fine by the termor himself, who may be ousted within five years after the expiration of the term. In the wellknown case of *Taylor dem. Atkyns v. Horde* (c) the same doctrine was upheld; and it was laid down by the Court generally (d) that, "if the lessee for life or years makes a feoffment, the lessor may still distrain for the rent; or charge the person to whom it is paid, as a receiver; or bring an ejectment; and choose whether he will be considered as disseised." This decision is referred to with approbation in *Doe dem. Maddock v. Lynes* (e), and establishes the principle that the mere act of the termor cannot so destroy the term as to prevent the reversioner, or those claiming under him, from treating it as a subsisting one and electing to overlook the disseisin. Disseisin is a fact which ought to be found by a jury, and cannot be inferred by the Court. There is moreover in the present case this distinguishing feature; viz. that *W. Pett*, when he made the feoffment, had two estates in him; the term in his own right as trustee, and a moiety of the freehold in reversion in right of his wife. The law

1840.

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Doe dem.
Blight
against
Pett.

(a) 1 *Ventr.* 241. S. C. 2 *Lev.* 52.(b) 3 *Rep.* 77 a.(c) 1 *Burr.* 60.(d) 1 *Burr.* 112.(e) 3 *B. & C.* 388.

will

1840.

Doz dem.
Blight
against
Pett.

will therefore refer his acts to his rightful title, without reference to the intention which he actually entertained. Hence the entry and sole perception of the profits by the elder *Pett* are referable to his title as assignee of the term; and the feoffment and fine to his reversionary freehold. If this view be correct, there was no forfeiture or destruction of the term, which therefore passed to his administrator de bonis non, and the plaintiff is entitled to recover on the third count. But, supposing the term out of the question, it is clear that the nieces under coverture were not barred during coverture; and after the death of *Mary Braund* the freehold and right of entry either survived by curtesy to her husband named in the first count, or descended to her son and heir named in the second. As the rights of all the coparceners are therefore still subsisting, they are all properly joined in the demise; or, if any are improperly joined, their names may be rejected as superfluous, and the plaintiff may recover in the names of those alone who are entitled to enter. Lastly, the entry of *Bonifant* in the name and on behalf of the parties entitled is sufficient to avoid the effect of the fine, supposing it to have any, and supposing his title, as representative of the termor, to be insufficient.

Erle, contra. Though the authorities cited are sufficient to shew that there was no merger of the term, yet it was either destroyed by the acts of the termor, and the fine and non-claim must operate to exclude the heir; or else it is still subsisting and passed to the defendant under the will of *William Pett*, the father; *Fenton v. Forster* (a). The assent of the executrix will

(a) 3 Dy. 307 b.

be presumed. [*Patteson J.* It is not clear that the will of *Pett* contained any sufficient devise of the term. *Coleridge J.* The devise, as stated in the special case, professes to convey the *fee*.] The effect of the fine and recovery was to give *Pett* a tortious fee, defeasible only by timely entry of the parties rightfully entitled. The married lessors of the plaintiff have lost *their* title by non-claim; *Doe dem. Wright v. Plumtre (a)*: and, though *Sarah Blight* and *Braund* the younger have five years after 1837 and 1836, respectively, to make their entry, there is no demise in the declaration by them alone, or by either of them. *Doe dem. Poole v. Errington (b)* shews that the plaintiff cannot recover on a joint demise where the lessors ought to make separate demises. The effect of a feoffment by lessee for years in disseising the rightful claimant and conveying a fee is explained in *Litt. s. 611., Co. Litt. 330 b., 367 b.*, and by many old authorities cited in *Butler's* note to *Co. Litt. 330 b.*: and the doctrine of disseisin at election, as laid down by Lord *Mansfield* in *Taylor dem. Atkyns v. Horde (c)*, has been controverted in that note and by other authorities (*d*), and is inapplicable to the case of a fine with proclamations. In *Doe dem. Maddock v. Lynes (e)* the feoffment was not by the termors themselves or by their assent; and *Taunton J.*, in *Doe dem. Cooper v. Finch (g)*, intimates that the decision might have been different if the termors had been parties to the feoffment. [*Lord Denman C. J.* The doctrine seems a highly valuable one, and necessary to be preserved. *Patteson J.* At all

1840.

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Doe dem.
Blight
against
Pett.

(a) 3 B. & Ald. 474.

(b) 1 A. & E. 750.

(c) 1 Burr. 60.

(d) See 1 *Preston on Conveyancing*, 59, 60. (3d ed.)

(e) 3 B. & C. 388.

(g) 4 B. & Ad. 283; see p. 290.

1840.

—
Doe dem.
Blight
against
Pett.

events, the cases agree that the reversioner may enter within five years after the feoffment, or five years after the end of the term ; *Brandlyn v. Ord* (a).] Upon a special case the Court may find a disseisin from the facts stated. The special case shews that *Pett* entered into possession, not as assignee of the term, but as devisee. His feoffment was therefore equivalent to that of a mere stranger to the term, and cannot be treated as a disseisin at election only within the decided cases. But it is said that his entry must be referred to his seisin in right of his wife, who was a coparcener. Admitting that he represented a coparcener, yet his entry with intent to take the whole to his own use was a disseisin of the other coparceners, and the fine will operate ; *Co. Lit.* 243 b. ; *Anonymous* case in *Moore* (b), *Townsend v. Pastor* (c). It amounted to an actual ouster of the rest ; *Doe dem. Fishar v. Prosser* (d). As to the argument that the feoffment was a fraud, the testator *Pett* could not have alleged his own fraud ; and consequently *Bonifant*, who represents him, is not in a condition to take advantage of it. The result is, that the only parties, if any, entitled to recover are *Sarah Blight* and *Braund* the younger, who are not stated to have made any sufficient demise to the nominal plaintiff, and who have not entered to avoid the fine ; for the entry of *Bonifant* does not appear to have been with their authority or assent. [*Patteson* J. The bringing an ejectment would be a ratification of his act (e).]

Manning, in reply. It will be enough to shew that the feoffment was either a fraud, or a disseisin only at

(a) 1 Atk. 571.

(b) *Moore*, 59, 60.

(c) 4 Leon. 52.

(d) 1 Cowp. 217.

(e) *Co. Litt.* 258 a. *Fitchet v. Adams*, 2 Stra. 1128.

election

election. If fraudulent, then the fine is wholly inoperative. If a disseisin, then we elect not to be disseised. As for the supposed bequest of the term by *Pett*, there is no ground to presume it; for it is clear that all parties believed the term extinguished. Nor can the assent of the executrix be presumed in a case where the assent would give effect to a breach of trust; for the term was meant to be attendant on the inheritance, and the bequest would give it a different devolution. There is no distinction between a special case and a special verdict; for in neither case can the Court draw inferences of fact, or presume a fact, unless such a power is given by consent of the parties; *Doe dem. Taylor v. Crisp (a)*.

1840.

Doe dem.
Blight
against
Pett.

Lord DENMAN C. J., in this term (1st *May*), delivered the judgment of the Court.

This is a case of considerable intricacy: and it is necessary to attend closely to the dates and situation of the parties in order to see its bearings. The original testator's will is dated in 1804, and was never republished. He did not acquire any interest in the property in question till 1814, when he purchased the fee-simple; so that his will was inoperative upon the freehold and inheritance of the land. A term of years in the land had been assigned in 1814 to *William Pett* (the residuary legatee in the will) to attend the inheritance. That term did not pass by the will; for it never was in the testator. Upon the testator's death in 1820, the fee simple descended to *Mary Pett* as to one moiety, and to *Sarah Blight, Elizabeth Bonifant, Frances Braund,* and *Mary Braund*, as to the other moiety, the term of years still being in *William Pett* the husband of *Mary*. One question made in the case is, whether that term

(a) 8 A. & E. 779.

1840.

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DOR dem.
BLIGHT
against
PETT.

merged in the inheritance of *Mary Pett*: but, upon the argument, that point was very properly given up.

William and Mary Pett entered into possession and received the rents without accounting to the other coparceners; and, in *August* 1823, enfeoffed *Joseph Risdon*. By that feoffment, undoubtedly, the fee passed to *Risdon*; the feoffment being tortious indeed as to a moiety, but not the less operative, inasmuch as the possession was in the feoffors. See *Mr. Butler's* elaborate note to *Co. Litt.* 330 b.; see also *Co. Litt.* 373 b. and 374 a. "Here it is to be understood, that when one coparcener doth generally enter into the whole, this doth not divest the estate which descendeth by the law to the other, *unless she that doth enter claimeth the whole, and taketh the profits of the whole*; for that shall divest the freehold in law of the other parceners; otherwise it is after the parceners be *actually seised*" (which they were not here), "the taking of the whole profits, or any claim made by the one, cannot put the other out of possession without an actual putting out or disseisin; and in this case of *Littleton* where one coparcener entereth into the whole, and maketh a feoffment of the whole, this divesteth the freehold in law out of the other coparcener." See also *Co. Litt.* 243 b., entirely to the same effect. The *Anonymous* case in *Moore* (a) is also an authority to the same point, and *Townsend v. Pastor* (b). The feoffment, therefore, was not void, nor the fine subsequently levied. The doctrine of disseisin at election, as laid down by Lord *Mansfield* in the case of *Taylor v. Horde and Others* (c), does not apply to cases of fines with proclamations; for his Lordship there says, in page 113., "*Except the special case of fines with proclamations* (which stands entirely upon distinct grounds,

(a) *Moore*, 60.(b) 4 *Leon.* 52.(c) 1 *Burr.* 60.

and

and the construction of the statute 4 H. 7. c. 24. for the sake of the bar), I cannot think of a case where the true owner, whose entry is not taken away, may not elect (by pursuing a possessory remedy) to be deemed as not having been disseised." It follows that an entry was necessary to avoid the fine in question. Now, as all the parties were married women at the date of the fine, the entry might be within five years after they became discovert, as regards them, or within five years of their death, if they died under coverture, as regards their heirs. The entry in this case was on the 1st *January*, 1838 (assuming, for the purpose of the argument, that it was an entry properly made, and with proper authority), and was in proper time as regards *Sarah Blight*, whose husband died in 1837, and as regards *William Hockin Braund* the younger, whose mother *Mary Braund* died in 1836 under coverture: but the entry was not in proper time as regards *Samuel Bonifant* and his wife, and *Lewis Braund* and his wife; for it was distinctly held in *Doe dem. Wright v. Plumtre* (a), on the authority of *Hulm v. Heylock* (b), that the husband is barred by the fine after five years, although the wife has five years after discoverture: and, as the wife cannot, during coverture, demise, or sue, or enter without her husband, it follows that the entry, being too late as to him, is too late as to her during her coverture.

This brings us to the question whether the demises are properly laid in this declaration. The first and second are on the joint demise of the husbands as well as the other parties. They are clearly wrong as to

1840.

Doe dem.
BLIGHT
against
FERR.

(a) 3 B. & Ald. 474.

(b) Cro. Car. 200.

1840.

DOE dem.
BLIGHT
against
PETT.

them and their wives, and, being so, cannot be supported as to the other parties; for, if we held them right as to those other parties, we should be in effect treating a joint demise as four several demises. The first and second demise being thus out of the question, the third remains to be considered, which relates to the term of years assigned to *William Pett* to attend the inheritance. Now, as *Mary Pett*, the executrix of *William Pett*, died intestate, the legal interest in this term, if it still subsists, must be in *Samuel Bonifant*, the administrator de bonis non; for we do not feel ourselves at liberty to presume that the term vested in the defendant under the will of his father with the assent of *Mary Pett* the executrix, inasmuch as the will does not contain any express mention of the term, nor is the assent of the executrix stated as a fact in the case. The point, therefore, on this demise is, whether the term was destroyed by the feoffment in 1823? Now the feoffment was made by the termor himself: and all the authorities which are collected in *Doe v. Lynes* (a) and in the notes to *Clerke v. Pymell* (b) shew that in such case the term is forfeited; and by reason of the fine the person entitled to the remainder or reversion, or rather perhaps we should say the person entitled to the freehold, unless under disability, must enter within five years in order to take advantage of the forfeiture; as to which entry, in this particular case, we have already expressed our opinion: or such person may waive the forfeiture and enter at any time within five years after the expiration of the term; for he has two titles, one by the forfeiture, the other by the expiration of the term;

(a) 3 B. & C. 388.

(b) 1 Wms. Saund. 319.

and the latter title is held to be a new right which first accrues after the expiration of the term, and so within the second saving of stat. 4 H. 7. c. 24. See *Whaley v. Tankard* (a), and the other cases cited in Mr. Serjeant Williams's note above alluded to; and, though a distinction is supposed to be taken in *Margaret Podger's* case (b), between a feoffment and fine by tenant for life, and by tenant for years, yet, on examining that passage, it relates only to cases where a stranger ousts the lessee for years, and disseises the lessor, which are very different from a feoffment and fine by the lessee for years himself. The distinction attempted is not founded in reason and justice; for, if a person entitled in remainder after an estate for life may elect to waive the forfeiture incurred by the fine of the tenant for life, and to enter within five years after the death of the tenant for life, why may not a person entitled after a term of years do the same thing; that is, elect to treat the term as not forfeited, but still subsisting, and wait till the expiration of it? If, then, he may treat the term as still subsisting for one purpose, is there any reason why he may not do so for another, and (if he can) obtain the legal interest in it, and set it up for his own benefit? This view of the case is free from the objection made by the defendant, namely, that the term can only be held to be subsisting by treating the feoffment as fraudulent, which the administrator de bonis non cannot do; for that would be to set up the fraud of the person under whom he claims.

For these reasons we are of opinion that the lessors of the plaintiff are entitled to treat the term as still

1840.

Dox dem.
Blight
against
Perr.

(a) 2 Lev. 52. 1 Ventr. 241.

(b) 9 Co. 105. b.

1840.

DOE dem.
BUGHT
against
PETT.

subsisting as to their undivided shares of the land, and that the verdict must be entered on the third demise: and it must be entered, in point of form, for the whole of the land; for we do not see any principle on which the term can be divided, or held to be destroyed in part, though the lessors of the plaintiff are only beneficially entitled amongst them to a moiety of the premises.

S. Judgment for plaintiff on the third demise.

Tuesday,
May 5th.

ENGLAND *against* DAVIDSON.

Defendant offered a reward to whoever could give such information as would lead to the conviction of a felon. Plaintiff, who was constable and police officer of the district where the felony was committed, gave such information. Held, on demurrer, that plaintiff's having given the information was a good consideration for a promise by defendant to pay the reward.

ASSUMPSIT. The declaration stated that heretofore, towit &c., the defendant caused to be published a certain hand bill, placard, or advertisement, headed " Fifty pounds reward ;" whereby, after reciting that, late on the night of &c., the mansion house of defendant, at &c., was feloniously entered by three men, who effected their escape, that two men had been taken into custody on suspicion of having been concerned in the felony, and that a third, supposed to belong to the gang, had been traced to *Carlisle*, and was of the following description, &c., the defendant did promise and undertake that whoever would give such information as should lead to the conviction of the offender or offenders should receive the above reward: that plaintiff, confiding &c., did afterwards, towit on &c., give such information as led to the conviction of one of the said offenders, towit one *David Robson*; and that afterwards, towit at the assizes for *Northumberland*, *D. R.*, who was guilty of the said offence, towit the feloniously entering &c., was in due course of law convicted of the said offence of feloniously entering &c., in consequence of such information so given by plaintiff

plaintiff; of all which said several premises defendant afterwards, towit on &c., had notice, and was then requested by plaintiff to pay him the said sum of 50*l.*; and defendant afterwards, towit on &c., in consideration of the premises, then promised plaintiff to pay him the sum of 50*l.*: breach, that, although defendant, in part performance of his said promise and undertaking, towit on &c., did pay to plaintiff the sum of 5*l.* 5*s.*, in part payment of the said sum of 50*l.*, yet &c. (breach, non-payment of the residue).

Third plea. That heretofore, and long before and at the time when the house of defendant was so feloniously entered, and continually from thence hitherto, plaintiff was, and now is, a constable and police officer of the district where the said house of defendant is situate, and the said offence was committed; and it then was the duty of plaintiff, as such constable and police officer, to have given, and to give, every information which might lead to the conviction of the said offender, and to apprehend him and prosecute him to conviction, if guilty, without any payment or reward to him made in that behalf: that, by the said advertisement partly set out in the declaration, defendant gave notice and promised that whoever would give such information to plaintiff, therein described as police officer, *Hexham*, as should lead to the conviction of the offender or offenders, should receive the said reward in the said advertisement mentioned, and in no other manner whatever: and that, by reason of the premises, the said promise was and is void in law. Verification.

Demurrer, assigning for causes that the plea amounts to the general issue, and does not deny, or confess and avoid, and is multifarious, and tenders an immaterial issue. Joinder.

1840.

 ENGLAND
 against
 DAVIDSON.

1840.

ENGLAND
against
DAVIDSON.

Ingham now appeared for the plaintiff: but the Court called on

Martin, for the defendant. No consideration is shewn on this record for the defendant's promise; the plaintiff was bound to do that, the doing of which is stated as the consideration. The duty of a constable is to do his utmost to discover, pursue, and apprehend felons; *Com. Dig. Leet*, (M 9.), (M 10.); *Justices of Peace*, (B 79.). It has been laid down that a sailor cannot recover on a promise by the master to pay him for extra work in navigating the ship, the sailor being bound to do his utmost, independently of any fresh contract; *Harris v. Watson* (a), explained by Lord *Ellenborough* in *Stilk v. Myrick* (b). The principle was recognized in *Newman v. Walters* (c), where the case of a passenger was distinguished. [*Cole-ridge J.* Those cases turn merely on the nature of the contract made by the sailor.] If the duty here incumbent on the plaintiff was to do all that the declaration lays as the consideration, the case is the same as if he had been under a previous contract to do all. The cases on the subject of consideration are collected in note [b] to *Barber v. Fox* (d). [*Ingham*. The constable was not bound to procure evidence.] The contract here declared upon is against public policy.

Lord DENMAN C. J. I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We

(a) *Peake*, N. P. C. 72.

(b) 2 *Camp.* 317. S. C. 6 *Exp.* 129.

(c) 3 B. & P. 612.

(d) 2 *Wms. Saund.* 137 c. See also *Jones v. Waite*, 5 *New Ca.* 341. 351. 356.; *Haigh v. Brooks*, 10 *A. & E.* 309.

should

should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear.

1840.

ENGLAND
against
DAVIDSON.

LITLEDALE, PATTESON, and COLERIDGE Js. concurred.

Judgment for the defendant.

WOODLAND and Another *against* FULLER and Another. Tuesday,
May 5th.

TROVER. By order of *Coleridge J.*, and consent of parties, after issue joined, the following facts were stated for the opinion of this court.

The plaintiffs are assignees of the estate and effects of the Reverend *George Henry Templer*, an insolvent debtor; and the defendants are judgment creditors of the said *G. H. T.*

The defendants brought an action on promises against *Templer*, which came on for trial at the *Wiltshire* assizes, 7th *March* 1839, when a verdict was returned for the plaintiffs for 728*l.* 16*s.* damages; and *Maule B.*, before whom the cause was tried, certified that execution ought to issue in one week. Final judgment was signed by the plaintiffs for 763*l.* 1*s.*, on 15th *March* 1839; and, on the same day, the now defendants subsequently sued out of this Court a writ of testatum *fi. fa.*, directed to the sheriff of *Somersetshire*, commanding him to levy the last-mentioned sum, with interest thereon,

Defendant having obtained a judgment against *T.*, lodged a *fi. fa.* with the deputy (under stat. 3 & 4 *W. 4. c. 42. s. 20.*) of the sheriff, and the deputy immediately issued a warrant to an officer. Afterwards, on the same day, a vesting order was made (under stat. 1 & 2 *Vict. c. 110. s. 37.*) by the Insolvent Debtors' Court transferring the estate of *T.* The assignee under this order took possession of *T.*'s property; and afterwards the sheriff's officer seized it.

Held, that the seizure was proper.

1840.
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 WOODLAND
 against
 FULLER.

at the rate of 4 per cent. per annum, from the 15th *March* aforesaid, of the goods and chattels of *Templer*. The testatum *fi. fa.* was delivered by the now defendants to Messrs. *Dyne* and Co., at their office in *Lincoln's Inn Fields*, at a quarter past one in the afternoon of 15th *March*, and before the petition of *Templer* was filed, or the vesting order made, as hereinafter mentioned.

Before, and at, and after the delivery of the writ to *Dyne* and Co., the goods and chattels which form the subject of the present action were the goods and chattels of *Templer*.

No member of the firm of *Dyne* and Co. was, at the time of the delivery, sheriff or undersheriff of *Somersetshire*; but *Dyne* and Co. were then deputies, appointed by the sheriff of *Somersetshire* (under stat. 3 & 4 *W. 4. c. 42. (a)*) for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to the said sheriff.

At the time of delivering the writ, *Dyne* and Co. granted a warrant thereon, in pursuance of their appointment, for levying the amount of the damages; and they, on the same day, sent the warrant by post to the officer to whom it was directed, and who received it on the following morning.

The testatum *fi. fa.* was not at any time in the county of *Somerset* until 16th *March*. On 14th *March*, final judgment in an action of debt, wherein *Richard Hiorns* was plaintiff and *Templer* defendant, was signed for the plaintiff, for 4*l.* 17*s.* 9*d.* debt, and 7*l.* 9*s.* damages. On the same day, a writ of *ca. sa.* was sued out in the said

(a) Sect. 20.

action by the plaintiff therein, directed to the sheriff of *Middlesex*, and duly indorsed; by virtue whereof *Templer* was taken on the same day. Afterwards, on the same day, by a writ of habeas corpus, directed to the sheriff of *Middlesex*, *Templer* was brought up before a Judge, and by him duly committed to the custody of the marshal of the Court of Queen's Bench, in execution for the last-mentioned debt and damages.

Templer was, by virtue of the said commitment, thenceforward detained in actual custody, within the walls of the Queen's Bench prison, in execution for the last-mentioned debt and damages, until after 15th *March*; on which day (within fourteen days next after the commencement of the actual custody of *Templer*) he availed himself of the provisions of the statute then in force for the relief of insolvent debtors (*a*), and duly applied by petition to the Court for the Relief of Insolvent Debtors for his discharge from custody, according to the provisions of the said act: and which petition was duly subscribed by *Templer*, and was filed in the said court after the hour of three in the afternoon of the said day.

Upon the filing of the petition, the Court, on the 15th *March*, after three in the afternoon, made the usual vesting order, and thereby ordered that all the real and personal estate and effects of *Templer* (with certain exceptions authorised by the act, and not applying to any part of the goods and chattels the subject of this action) should be vested in *Samuel Sturgis*, then being, and as, the provisional assignee of the estates and effects of insolvent debtors; and the vesting order was, on the day and year last aforesaid, entered of record in the last-

1840.

WOODLAND
against
FULLER.

(a) Stat. 1 & 2 Vict. c. 110.

1840.

WOODLAND
against
FULLER.

mentioned court; and notice thereof was published, as the said court directed. The petition of *Templer* has not been dismissed by the said court; but, on 3d *June* 1839, *Templer* was brought up before the said Court, to be dealt with according to the provisions of the said act: and his petition was then heard; and the said Court duly adjudged that he should be forthwith discharged from custody, and entitled to the benefit of the act, as to the several debts and sums due to, and claims made by, the several persons mentioned in his schedule, and as to claims on negotiable securities mentioned in the said schedule. On the same 15th *March*, notice of the filing of the petition, and of the making the vesting order, was given to *Dyne* and Co.

At eleven in the forenoon of 16th *March*, *J. P. Melmoth*, by the authority, and in the name and on the behalf, of the provisional assignee, took possession of a house then lately occupied by *Templer*, and of the said goods and chattels then being therein; and which became vested in the provisional assignee by the said vesting order, and subsequently in the plaintiffs on their appointment as assignees, subject to any right which the now defendants may have acquired, under the circumstances stated in this case, to seize the same and levy thereout their said damages. *Melmoth* then kept possession of the said goods and chattels until the seizure thereof by the sheriff as hereinafter mentioned.

Several hours after the provisional assignee had so taken possession, and about five of the afternoon of 16th *March*, an officer of the sheriff of *Somersetshire* entered the said house, with the said warrant, and with the intention of executing the same on the said goods and chattels, when he was informed by the said *Melmoth* that

that he was in possession thereof under an authority from the said provisional assignee, and on his behalf; but the officer, in order to execute the warrant, took possession of the said goods and chattels, and continued in possession thereof from the time of the said seizure until after the appointment of the plaintiffs as assignees.

1840.

WOODLAND
against
FULLER.

The now defendants, before the seizure, had notice of the filing of the petition and the making of the vesting order, but ordered and directed the seizure; and the officers continued in possession, and thereby converted the goods and chattels to their own use.

The plaintiffs were, on 25th *March*, appointed assignees of the estate and effects of *Templer* for the purposes of the last-mentioned act, and, on the same day, signified to the said court their acceptance of the said appointment, which (after the said acceptance) was entered of record of the said Court. After the seizure under the warrant, the sheriff of *Somersetshire* applied for relief under the *Interpleader Act*, when it was ordered by *Coltman J.* that the present action should be brought.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in this action. If so, a judgment to be entered against them by confession immediately, or otherwise as the Court may think fit; if not, a judgment to be entered of *nolle prosequi*, immediately, or otherwise as the Court may think fit.

Bere for the plaintiffs. The first question is, whether the delivery of the writ to the deputies in *London* under stat. 3 & 4 *W. 4. c. 42. s. 20.* was equivalent to a delivery to the sheriff in *Somersetshire*. The second question

1840.

WOODLAND
against
FULLER.

tion is, whether the provisional assignee, by the vesting order made on the same day, did not become possessed of all *Templer's* goods which had not been actually seized by the sheriff, subject, indeed, to the claim of the execution creditor, but still so as to entitle the assignee to maintain trover.

On the first point, *Harris v. Loyd* (a) is an authority for the defendants; but the same case is also an authority for the plaintiffs on the second point. There a voluntary assignment to trustees was made on the same day on which the writ had been delivered to the agent. Lord Abinger C. B. said, "The goods were liable to seizure; the property in them was not indeed divested by the writ, and the trustees might take them, but only subject to the right of the execution creditor." Here, instead of a voluntary assignment, is a vesting order under stat. 1 & 2 *Vict. c. 110. s. 37*. The goods, therefore, the property not being divested by delivery of the writ without seizure, passed to the assignees: and sect. 42 directs that the provisional assignee shall take possession. *Samuel v. Duke* (b) shews that the mere delivery of the writ does not prevent the debtor from selling, though the purchaser will take subject to the claims of the execution creditor: and the assignees under the statute stand in the place of the debtor.

Erle, contra. From *Harris v. Loyd* (a) and *Williams v. Waring* (c) it appears that the case is as if the writ had been placed in the sheriff's hands in *Somersetshire*, when it was delivered to the deputies. After this the

[†] (a) 5 *M. & W.* 432.

(b) 3 *M. & W.* 632.

(c) 4 *Dowl. P. C.* 200.

petition was filed and the vesting order made. Now *Samuel v. Duke* (a) and *Payne v. Drewe* (b) shew that the goods were bound by the delivery. Therefore the provisional assignee took only goods which were so bound. The law on this subject is distinctly laid down in *Giles v. Grover* (c). The vesting order now does only what the debtor's own assignment formerly did: and by such assignment it is clear that the debtor would have had no power to convey an absolute right to goods which were bound before the assignment; *Sims v. Simpson* (d). "The meaning of the expression that the property of the goods is *bound* is, not that the property in them is *altered*, for such alteration does not, nor ever did, take place until actual sale of the goods under the writ: but that the defendant, from the time that they are bound, cannot dispose of them, unless in market overt, so as to prevent their being taken in execution:" note [i] to *Wheatly v. Lane* (e), (citing *Payne v. Drewe* (b)). It is added: "This time, since the above statute" (of Frauds, 29 C. 2. c. 3. s. 16.), "is the delivery of the writ to the sheriff." *Bayly v. Bunning* (g) is also referred to, where the argument turned on the relation to the act of bankruptcy, a doctrine inapplicable here (h). [Patteson J. As to the priority given to the earlier of two proceedings taking place on the same day, *Thomas v. Desanges* (i) is an authority in your favour.] *Sadler v. Leigh* (k) is to the same effect.

1840.

 WOODLAND
 against
 FULLER.

(a) 3 M. & W. 622.

(b) 4 East, 523.

(c) 9 Bing. 128. See pp. 138—140. (d) 1 New. Ca. 306.

(e) 1 Wms. Saund. 219 g.

(g) 1 Lev. 173.

(h) See stat. 21 Ja. 1. c. 19. s. 9.

(i) 2 B. & Ald. 586.

(k) 4 Camp. 197.

Bere

1840.

—
WOODLAND
against
FULLER.

Bere in reply. This is an action of trover : the question is as to the plaintiffs' right of possession, which they clearly had, whether the goods were bound or not. And, further, it may be contended that the vesting order had the effect of a sale in market overt. The assignment is for the general benefit of the creditors, as in bankruptcy, and ought not to be defeated by a writ unexecuted.

LORD DENMAN C. J. I have no doubt in this case. Stat. 1 & 2 *Vict. c. 110. s. 37.* gives to the vesting order no greater effect than the assignment of the debtor had formerly; and such an assignment would only have vested the property in the assignee, subject to the right of the execution creditor.

LITLEDALE J. Since the Statute of Frauds, the property is bound from the delivery to the sheriff. The seizure confers only a right to sell, not a property; for the defendant may sell, subject to the right of the execution creditor; and, where the goods are worth more than the sum for which execution issues, such sale passes the right to the residue. Here, however, it is contended that the vesting order has a greater effect than such a sale, and resembles a sale in market overt: but I do not see how we can give such an effect to the transaction. Nor has the case any resemblance to a question under a bankruptcy, where the power of the sheriff to sell depends on his seizing before the act of bankruptcy. The sheriff, therefore, in this case, had a right to sell. It is said that this is an action of trover, and that therefore the action may be maintained on the right of possession. But the question

tion is raised upon interpleader, under the authority of the Court, to decide the rights of the parties; and we ought not to allow this question to be evaded. Even if issue were joined on a plea of not possessed modo et formâ, I do not know that the defendants would not be able, on these facts, to establish a right of possession. At any rate, the question might be raised by some special plea.

1840.

WOODLAND
against
FULLER.

PATTESON J. All the steps in this case are clear except one, as to which I was struck by Mr. *Bere's* argument; I mean, on the effect of the vesting order. It is clear that the delivery to the deputy is a delivery to the sheriff. That, however, does not change the property, nor, indeed, does the seizure do so; *Giles v. Grover (a)*. But the delivery does bind it, so that, into whose hands it comes afterwards, it is liable to be seized under the writ: the debtor may convey it away, but not so as to defeat the right of the execution creditor. It is true that the debtor might defeat that right by a sale in market overt, which is a peculiar proceeding. But the law as to such a sale applies to no other transaction. Then a conveyance by the insolvent could give no more right than any other conveyance, because he could convey only what he had at the time. There is nothing in the act to shew that such a conveyance was equivalent to a sale in market overt. Then was the vesting order so? I do not like the doctrine of equivalents; but here the statute merely says that the order shall have the effect of vesting, without carrying the transaction beyond the conveyance under the former Insolvent Debtors' Act: it gets rid of no charge. Then how

(a) 9 Bing, 128.

is

1840.

WOODLAND
against
FULLER.

is the charge to be enforced? Mr. *Bere* seemed to contend that it could not be enforced by the sheriff's seizure. But this has been the ordinary way by which the sheriff has enforced: and I cannot see why he is not to enforce the execution here as he would against a vendee. Thus the general property is in the plaintiffs, and they had possession under it; but the sheriff was not a wrongdoer when he seized in right of the execution creditor; and therefore trover could not be maintained.

COLERIDGE J. It appears to be conceded, and properly, that the right of the defendants must prevail unless the vesting order can have the effect of a sale in market overt. But I see no analogy between the two. We know the history of the vesting order: it merely takes the place of the provisional assignment by the insolvent, from whom all emanated under the former acts. Nothing then could pass but what the insolvent had; and all passed subject to such rights as could attach against him. Here the delivery of the writ does not alter the property, but binds it so as to give the sheriff a right to seize, unless the goods be sold in market overt. The vesting order puts the Court in the place of the insolvent, and no more. Whatever, therefore, passed, passed subject to the effect of the writ.

Judgment for defendants.

1840.

REGULA GENERALIS.

Easter term, 3 VICTORIA, 1840.

IT IS ORDERED, That every person who shall intend to apply for admission as an attorney of this Court, and who shall not have been admitted an attorney or solicitor of any other court, shall, (instead of the notices required by rule of *Trinity*, 31 G. 3., but in addition to the notices to be given to the Examiners, Masters, &c., as required by rule of *Hilary*, 6 W. 4., 1836, read in all the Courts,) for the space of one full term previous to the term in which he shall apply to be admitted, *enter or cause to be entered in two books*, to be kept for that purpose, one at the Chambers of the Lord Chief Justice of this Court, and the other at the Chambers of the other Judges, *his name and place or places of abode*, and also the *name or names and place or places of abode of the attorney or attorneys* to whom he shall have been articulated.

AND IT IS FURTHER ORDERED, That a printed copy of the list of admissions be stuck up in the Queen's Bench Office, and at the Judges' Hall or Chambers in *Rolls Garden*.

AND IT IS FURTHER ORDERED, That any person applying to be re-admitted an attorney of this Court shall (instead of the notices now required), *three days at the least previous to the first day of the term* on the last day of which he intends to apply to be re-admitted, leave
at

1840.

at the office of the Masters of this Court a notice in writing, containing his *name and place of or places of abode for the last preceding twelve months*. And that, before the said first day of term, he *shall enter or cause to be entered in the two before-mentioned books a like notice*, and shall, at the same time, *cause to be filed the affidavit upon which he seeks to be re-admitted, at the office of the Masters* aforesaid, and a copy thereof left at the Chambers of the Lord Chief Justice of the Court of Queen's Bench.

AND IT IS FURTHER ORDERED, That the Masters reduce such notices of re-admission into alphabetical order, and add the same to the list of admissions.

(Signed) DENMAN.
 J. LITTLEDALE.
 J. PATTESON.
 J. WILLIAMS.
 J. T. COLERIDGE.

1840.

The QUEEN *against* M'GOWAN, M.D.The QUEEN *against* The Same.The QUEEN *against* DUDLEY.The QUEEN *against* MADDY, D.C.L.The QUEEN *against* STANLEY.The QUEEN *against* M'GOWAN.The QUEEN *against* the Same.

INFORMATION in the nature of a quo warranto for exercising the office of mayor of *Exeter*. The plea stated that, on *November* 9th, 1838, six of the twelve aldermen chosen at the first election under stat. 5 & 6 *W.* 4. c. 76. went out of office according to sect. 25: that it became the duty of the council to elect six aldermen in the places of those retiring, and also a mayor, on *November* 9th, 1838: that the mayor gave notice of a meeting of council to be holden at the Guildhall at ten in the forenoon of that day, and issued summonses to the councillors to attend at that time, for the election of aldermen: that the meeting was holden accordingly at the time named, when the defendant, Dr. *M'Gowan* (being then a person qualified to be a councillor), was elected an alderman, and he thereupon subscribed the declarations required by the above act and stat. 9 *G.* 4. c. 17., and, by reason of the premises, became an alderman of the borough. That thereupon, and after the

In corporations governed by stat. 5 & 6 *W.* 4. c. 76., the election of mayor on *November* 9th must precede that of aldermen.

A prior election of aldermen, whether at the quarterly meeting holden according to sect. 69, or at an earlier meeting on the same day, is void.

Stat. 5 & 6 *W.* 4. c. 76. s. 25. does not prevent the outgoing aldermen from voting in the election of mayor, although the candidate for whom they vote be an alderman. And the party elected

may be an outgoing alderman.

An outgoing alderman, elected mayor, and afterwards presiding at the election of aldermen, may at such election, under stat. 7 *W.* 4. & 1 *Vict.* c. 78. s. 14., give a casting vote, but not an original vote; for the mayor's right to vote in the first instance, under stat. 5 & 6 *W.* 4. c. 76. s. 69., is restricted by sect. 25 of the same act, when the mayor is an outgoing alderman.

VOL. XI.

3 M

said

1840.

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The QUEEN
against
M^cGOWAN.

said meeting had been so held, and after defendant had been so elected alderman, and had made and subscribed the declarations as aforesaid, viz. on *November* 9th, 1838, at the borough of *Exeter* aforesaid, a quarterly meeting of the council of the said borough was held at the Guildhall of the borough at noon, pursuant to stat. 5 & 6 *W. 4. c. 76.* (sects. 49, 69), for the purpose, among other things, of the election of a mayor for the then ensuing year; and that, at such meeting, defendant was duly elected mayor, after which he subscribed the declarations &c.; and that by reason of the premises he became and was the mayor of the said borough; by virtue whereof he, from and after such election, hath used and exercised &c. Demurrer and joinder. The demurrer was argued this term (*a*).

Sir *J. Campbell*, Attorney General, for the Crown. The defendant was not duly elected alderman, and was not a councillor, and therefore could not be elected mayor. It was irregular to appoint a meeting for choice of aldermen at ten o'clock on *November* 9th; that business should have been transacted at the quarterly meeting, which was holden at noon, as stat. 5 & 6 *W. 4. c. 76. s. 69.* directs. Had that course been followed, the election of mayor would, according to sect. 69, have been the first business, and the outgoing aldermen might have voted on such election; for sect. 25 provides that aldermen going out of office at the expiration of three years "shall not be entitled to vote in the election of a new alderman," which shews that, until the new aldermen are chosen, the outgoing ones retain their capacity of acting and voting, except as it is

(*a*) *April* 29th. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

limited in terms by the act. There is no provision expressly fixing the times at which the mayor and aldermen respectively shall be elected; but it is clear that, if the mayor did not appoint a preliminary meeting on the 9th *November* (which he is no where directed to do), the election of mayor, and now, by stat. 6 & 7 *W. 4. c. 105. s. 5. (a)*, the appointment of sheriff in the county of the city of *Exeter*, must precede the election of aldermen, and the outgoing aldermen might vote in both. Stat. 7 *W. 4. & 1 Vict. c. 78.* regulates the manner of electing aldermen for the future; and enacts, by sect. 14, that “in case of equality of votes among those entitled to vote the mayor or chairman shall have a casting vote, *whether or not he may be entitled to vote in the first instance.*” The person taking the chair, but not “entitled to vote in the first instance,” must be an outgoing alderman acting as chairman while there is no mayor. Assuming it, then, to be proved that the outgoing aldermen may vote in the election of mayor if their successors have not yet been elected, it cannot have been the intention of the act that the mayor should, at his option, exclude them from this privilege by appointing a special meeting to elect aldermen in the forenoon. And such a course would be very inconvenient. Must every councillor receive distinct summonses, under sect. 69, for each meeting? The business of the first might last beyond the hour fixed by law for the second. [*Littledale J.* There might not be time for the new aldermen to qualify; and then neither the outgoing aldermen nor their successors could act in the election of mayor.]

1840.

The QUEEN
against
M'GOWAN.

(a) See stat. 5 & 6 *W. 4. c. 76. s. 61.*

1840.

—
The QUEEN
against
M'GOWAN.

Cresswell, contra. It may be conceded that no option exists of holding the election of aldermen before or after that of mayor. But the course here followed, of electing them at a previous meeting, is the most free from difficulty; and it is nowhere prohibited. Looking to probability, the legislature is more likely to have intended that the mayor should be elected by persons over whom he is to preside than by those going out of office. A contrary argument would tend to shew that town councillors, as well as aldermen, ought to have been elected after the mayor. The first election of aldermen must have preceded that of mayor; and the statute does not shew any intention to prevent that course being taken in future. [*Littledale J.* A special provision was necessary for the first election. All the parts of the council could not be created *uno flatu*. *Patteson J.* There was no "council" to act in the first election.] Sect. 140 authorised the King in Privy Council to appoint days and times, during a certain period, for doing the several matters required by the act, in lieu of the days and times before specified: according to the argument for the Crown he could not properly have appointed them so as to make the election of aldermen precede that of mayor: yet the act does not prescribe such a restriction. The enactment of sect. 69, that "the first business transacted at the quarterly meeting in *November* shall be the election of mayor," does not limit the council to one meeting on that day: nor is it any where enacted that the aldermen shall be chosen at a quarterly meeting. Under the system contended for, the electoral body might not be full at the time of the election of mayor. The acts do not provide that the old aldermen shall remain in office till their successors are appointed. [*Littledale J.* They go out of office on *November* 9th; but it is not clear that they

they do so as soon as the clock strikes twelve on the night of the 8th.] If the 9th happened on *Sunday*, the election of mayor would take place on the 10th; but it is not provided that, in such a case, the outgoing aldermen shall continue another day, though a mayor, by stat. 6 & 7 *W. 4. c. 105. s. 4.*, is kept in office till his successor has subscribed the declaration. Then the choice, in the case just put, must rest with the councillors and the six remaining aldermen: yet stat. 7 *W. 4. & 1 Vict. c. 78. s. 13.* shews the design of the legislature to be that the mayor shall be chosen by the full body of aldermen. In the cases there mentioned the number of aldermen is to be completed by election before the election of mayor. [*Littledale J.* If the aldermen must be elected at a quarterly meeting, and that is held on *Monday* when the 9th falls on *Sunday*, it seems to follow that, in such a case, the aldermen do not go out till the *Monday*. *Coleridge J.* By stat. 5 & 6 *W. 4. c. 76. s. 30.*, “whenever any day by this act appointed for any purpose shall in any year happen on a *Sunday*, in every such case the business so appointed to be done shall take place on the *Monday* following.” Are not those words strong enough to prevent the outgoing aldermen from vacating their offices till the *Monday* ?] Their doing so is not a “business appointed to be done.” [*Lord Denman C. J.* The business is, electing one in place of another. If that cannot be done, does not the office remain full ?] There is no provision that the old officers shall continue. Stat. 7 *W. 4. & 1 Vict. c. 78. s. 14.* applies as much to a meeting in the forenoon as to the quarterly meeting at which the mayor is elected. The provision (stat. 5 & 6 *W. 4. c. 76. s. 25.*), that an alderman shall not vote for his successor, is referable to any period at which the election may be held. If the aldermen are

1840.

THE QUEEN
against
M^r GOWAN.

1840.

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The QUEEN
against
McGOWAN.

to be elected after the mayor, the council for *Exeter* might be made to consist of forty nine members instead of forty eight (a); for an outgoing alderman might be elected mayor, and at the election of aldermen, which would follow, the whole number must be filled up, so that there would be thirty six councillors, twelve aldermen, and a mayor. [*Littledale J.* Would not the election of one outgoing alderman as mayor stand in place of the election of a new alderman?] By his election as mayor, his character of alderman is gone. Unless sect. 69 prohibits the forenoon meeting, which it does not, there is no argument in point of law against the defendant's election.

Sir *J. Campbell*, Attorney General, in reply. If this election would have been well made at the quarterly meeting, it could not properly be made before. The argument on the other side assumes that the old aldermen are out of office, by the mere expiration of time, when the 9th of *November* comes; but the provision against voting for successors, stat. 5 & 6 *W. 4. c. 76. s. 25.*, and the enactment as to a casting vote, in stat. 7 *W. 4. & 1 Vict. c. 78. s. 14.*, shew the contrary. To convene two corporate meetings in the same day is wholly irregular. The difficulty suggested, as to the first election of mayor after the statute, was obviated by the power given to make orders in council, under sect. 140: at all events, it affords no argument as to succeeding elections. Stat. 7 *W. 4 & 1 Vict. c. 78. s. 13.* relates to the filling up of certain vacancies, not to the regular annual elections. As to the argument that a corporation might be made to consist of forty nine, there is nothing in stat. 5 & 6 *W. 4. c. 76.* which

(a) Stat. 5 & 6 *W. 4. c. 76. s. 25. Sched. (A.). Sect. 2.*

prohibits

prohibits that. Sect. 25 enacts only that there shall be elected in every borough a mayor, the number of councillors mentioned in the schedule, and aldermen to one third of that number. And the consequence suggested results equally from the clear provision of the act with respect to councillors: a councillor may be elected mayor; and the vacancy, so created (as it may be said) in the council, will be filled up, according to sect. 30, on the ensuing 1st of *November*.

1840.

The QUEEN
against
M'GOWAN.

A second information was exhibited against this defendant for exercising the office of alderman. There were a plea and demurrer raising the same points as those above stated. The demurrer was not argued.

The Court said that, before deciding these cases, they would hear counsel in those of *Dudley*, *Stanley*, and *Maddy*.

Cur. adv. vult.

The QUEEN *against* DUDLEY.

INFORMATION in the nature of quo warranto for exercising the office of mayor of *Stafford*. The plea alleged that, on 9th *November* 1838, a quarterly meeting of the council was held for the purpose of electing a mayor and three aldermen. That the council, at that meeting, before proceeding to elect a mayor, proceeded to elect three aldermen in lieu of &c., and did elect from the persons qualified to be councillors three aldermen, viz. defendant and two others, they being then coun-

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cillors,

1840.

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The QUEEN
against
DUDLEY.

cillors, and qualified so to be, and fit persons to be aldermen: that they accepted and took on themselves the office, and acted as aldermen at the said meeting in the election after mentioned: that, after the election of said aldermen, the council, at the same meeting, proceeded to the election of a fit person to be mayor for the year commencing 9th *November* 1838, instead of the then mayor, out of the then aldermen and councillors, and did then accordingly elect defendant to be mayor &c., he then being an alderman of the said borough, and a fit person to be elected mayor: that he accepted the office, &c.: and that he, under and by virtue of that election, used and exercised &c.

Demurrer and joinder. The demurrer was argued this term (a).

Sir *W. W. Follett* for the Crown. This is the case, not of a preliminary meeting, as in *Regina v. M'Gowan* (b), but of a quarterly meeting, held at noon on *November* 9th, when, by the express words of stat. 5 & 6 *W. 4. c. 76. s. 69.*, the election of mayor ought to have been the first business. The election of aldermen before that of mayor was bad.

Joseph Addison, contra. It is clear that, at the first election under the statute, the councillors and aldermen must have been chosen before the mayor: and the policy of the act was, that at future elections also the number of aldermen should be complete, according to sect. 25, before a mayor was elected. This is confirmed by the

(a) *May* 2d. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(b) *Antè*, p. 869.

subsequent

subsequent enactments of stat. 7 *W. 4.* & 1 *Vict. c. 78.* s. 19. The intention of stat. 5 & 6 *W. 4. c. 76.* (a) is that none of the aldermen to be chosen in future shall remain in the council more than six years, unless re-elected; and that outgoing aldermen shall not vote for their own continuance in the council. Both these regulations may be violated if the mayor is elected before the aldermen; for the outgoing aldermen may vote for one of themselves to be mayor, and by that vote continue him in office beyond the term of six years: and this (as was argued in *Regina v. M'Gowan* (b)) would add one to the legitimate numbers of the council. It was answered that the same result must follow on a councillor being elected mayor; but there the addition would be only for eight days, since the number of councillors would not be filled up till 1st of *November* following, and the mayor would go out on the 9th. [*Littledale J.* The length of time makes no difference in principle.] Stat. 5 & 6 *W. 4. c. 76. s. 26.* enacts that the mayor shall continue to be a member of the council, notwithstanding any thing after contained as to *councillors* going out of office at the end of three years. Nothing is there said of aldermen so going out. A mayor must be either councillor or alderman: now, if the election of aldermen takes place after that of mayor, the mayor may go out of office as an alderman; and there is no clause to save his qualification. The legislature would have deemed such a clause necessary if they had not considered that the aldermen would be elected first. The provision as to councillors was necessary, because one third part of their number would always go out of office on

1840.

The QUEEN
against
DUDLEY.

(a) See sects. 25, 31.

(b) P. 874, *antè.**November*

1840.

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The QUEEN
against
DUDLEY.

November 1st, eight days before the mayor's year expired. [Lord *Denman* C. J. Is it clear that such a provision was necessary in any case?] The being councillor or alderman was an indispensable qualification. [Lord *Denman* C. J. Being so at the time of election.] Stat. 7 *W. 4.* & 1 *Vict.* c. 78. s. 14., cited in *Regina v. M'Gowan (a)*, is consistent with the case of an outgoing alderman presiding at an election of aldermen previous to that of mayor. There is nothing in the statutes to impeach this election, unless the final words of sect. 69 be held conclusive. [*Coleridge* J. You desire us to read that clause as enacting that, in every third year, the election of mayor shall *not* be the first business transacted at the quarterly meeting.] The construction must be according to the general tendency of the statute.

Bere (with Sir *W. W. Follett*, who had left the Court), in reply. The objection as to increasing the numbers of the council was answered in *Regina v. M'Gowan (b)*. A similar objection presses the defendant; for, if a newly elected aldermen were chosen mayor, there is no provision for filling up that vacancy, and the aldermen would be fewer than the legitimate number.

Cur. adv. vult.

The QUEEN against MADDY.

INFORMATION in the nature of quo warranto for exercising the office of mayor of *Gloucester*. Plea, that de-

(a) P. 871, *antè*.

(b) P. 875, *antè*.

defendant,

defendant, being qualified (as the plea particularly stated), was, on 25th *August* 1837, elected an alderman of *Gloucester* in place of *C. C.*, who had resigned: that defendant subscribed the declaration &c.: that afterwards, viz. on 9th *November* 1838, he, being such alderman, was elected mayor, and made and subscribed the declaration &c.; by reason of which &c. Verification.

Replication 3. That the election of a mayor was holden at a quarterly meeting of the council on 9th *November* 1838, at which defendant, being then one of the aldermen retiring from office, presided: that defendant and one *Walker* were nominated as fit persons for the office of mayor: that an election for mayor was thereupon held before any election of new aldermen; that defendant presided at such election; that eleven councillors voted for *Walker*, and seven councillors, and three aldermen (not those about to retire), voted for defendant; that defendant and *Chadborn*, another of the retiring aldermen, also voted for defendant; that no other votes were given; and that defendant then wrongfully declared himself elected mayor; which is the same election &c. Verification. Demurrer and joinder.

Replication 4. That defendant was mayor for the year expiring *November* 9th 1838, and he and *Chadborn* were two of the retiring aldermen: that defendant, as mayor, presided at the election of mayor then holden, which took place before any election of new aldermen: that defendant and *Chadborn*, not being members of the council except as such retiring aldermen, voted in the election: that eleven and ten votes were given for defendant and *Walker* respectively (as before replied): that defendant and *Chadborn*, being such retiring aldermen, and having no right to vote, assumed to vote, and did

1840.

The QUEEN
against
MADDY.

1840.
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 The QUEEN
 against
 MADDY.

did vote, for defendant &c. (conclusion as before). Demurrer and joinder. The demurrers were argued this term (a).

R. V. Richards for the defendant. Under stat. 5 & 6 W. 4. c. 76. sects. 25 and 69, the election of mayor was properly holden before that of aldermen; and there is nothing in the statute which could disable *Chadborn* and the defendant from voting in that election.

Crompton, contra. The defendant was elected by the votes of outgoing aldermen, and at an election of mayor holden before that of aldermen. Collecting the intent of stat. 5 & 6 W. 4. c. 76. from the whole of its provisions (according to *Com. Dig. Parliament*, (R 10.)), it appears that this proceeding was totally irregular. The aldermen ought to be elected before the mayor. It is against principle that the outgoing aldermen should be eligible to the office of mayor, and also have a voice in electing him. The final clause of sect. 69 (which alone creates any difficulty) was intended to arrange the manner in which business should come on, but not to affect the constitution of the council: it means only that the municipal body shall be complete by the election of a mayor, before other kinds of business are proceeded upon. It must be taken as implied that that which ought to precede the choice of a mayor, namely, the election of aldermen, will have been first gone through. The contrary course would have been impracticable on the first formation of the council. [*Patteson J.* The statute was so ill framed that it could not be acted upon

(a) May 6th. Before Lord Denman C. J., Littleale, Patteson, and Coleridge Js.

at first, in several particulars ; and power was given to issue an order of council for the purpose of removing the difficulties. No argument arises from that state of things. You cannot say that, because the act had clauses not applying to the original elections, its plain language shall be disregarded in subsequent ones.] If an outgoing alderman were elected mayor, and another person chosen in his place as alderman at a succeeding election for that office, he would be a mayor without qualification during the rest of the year ; and the act makes no provision for this case, though it does provide, by sect. 26, for the less important contingency of a mayor ceasing, for eight days, to be a councillor. And, by sect. 53, the mayor, if he acts after ceasing to be qualified, is liable to a penalty. [*Patteson J.* It is not said that he shall cease to be mayor. *Coleridge J.* The qualification contemplated in sect. 53 is probably that which the officer is to declare himself possessed of under sect. 50.] Sect. 13 of stat. 7 *W. 4.* & 1 *Vict.* c. 78. is an enactment in *pari materiâ*, and throws light upon those now in question.

1840.

The QUEEN
against
MADDY.

R. V. Richards, *contrâ*. The argument on the other side is that, if the mayor be an outgoing alderman, and there be a subsequent election of aldermen at the quarterly meeting, at which he is not re-elected alderman, he is mayor only for half an hour. But the words of stat. 5 & 6 *W. 4.* c. 76. s. 69. are express: the election of mayor is the first business to be done at the quarterly meeting ; and by sect. 49 the mayor, when elected, is in office for a year. The qualification mentioned in the penal clause, sect. 53, is clearly the seisin or possession
of

1840. of real or personal estate to the amount stated in the declaration required by sect. 50.

**The QUEEN
against
MADDY.**

Cur. adv. vult.

The QUEEN against STANLEY.

INFORMATION in the nature of quo warranto for exercising the office of an alderman of *Gloucester*. Plea, that defendant, being duly qualified, on 9th' *November* 1838, at an election of aldermen then holden to supply the places of three who then went out of office, was duly elected &c., and that he subscribed the declaration &c. Verification.

Replication 3. That, at the said election holden at the quarterly meeting &c., *Edwin Maddy, John Chadborn, and Harwick Shute* were the outgoing aldermen : that the said *E. Maddy, William Hicks*, and defendant were nominated as fit persons to be aldermen in their places; that three other persons were also nominated : that, the election being thereupon holden, *Maddy* was chairman and presided : that eleven votes were given for the three last-mentioned persons, and that ten persons, and also *Maddy*, voted for *Maddy, Hicks*, and defendant : that *Maddy*, as chairman, declared the votes equal, and then claimed as chairman to give, and gave, a casting vote for himself, *Hicks*, and defendant, and declared them elected: which is the same election &c. Verification.

Rejoinder. That, before the said election of aldermen, at the said quarterly meeting &c., an election of mayor was duly holden, and *Maddy* (being the mayor for the year expiring) was elected &c., and subscribed the declaration &c. : that he afterwards, as such mayor, presided

presided as chairman at such election of aldermen, and voted for himself, *Hicks*, and defendant: and that, the votes being equal, he declared them to be so, and, as such chairman, having due right to give a casting vote, did give such casting vote for the last mentioned parties, and declared them duly elected, which is the same &c. Verification.

Demurrer and joinder.

Replication 4. That, at the said quarterly meeting, *Maddy*, as mayor for the year expiring, presided: that, at the said meeting, and before the said election of aldermen, an election of mayor was holden, and *Maddy* and another nominated; that *Maddy* and *Chadborn*, being two of the retiring aldermen, and having no right to vote, assumed to vote, and voted, for *Maddy*, who then declared himself elected mayor: that other business was then transacted, after which, at the said meeting, the said election of aldermen was holden: that candidates were nominated (as stated in replication 3): that *Maddy*, under colour of his last mentioned election as mayor, presided: that votes were given as before stated, *Maddy* voting for himself, *Hicks*, and defendant: that *Maddy*, under colour of being mayor, and as presiding, declared the votes equal, and claimed to give, and gave, a casting vote for himself, *Hicks*, and defendant, and then and there declared them duly elected aldermen &c.: which is the same &c. Verification.

Demurrer and joinder.

The demurrers were argued together, in this term (a).

Sir *J. Campbell*, Attorney General, for the Crown.
If the Court decide that the election of aldermen should

(a) May 6th. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

1840.

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The QUEEN
against
STANLEY.

precede

1840.

**The QUEEN
against
STANLEY.**

precede that of mayor, the defendant's election is bad on that ground. But, at all events, the two votes given for him by *Maddy* were irregular. *Maddy*, as outgoing alderman, was forbidden, by stat. 5 & 6 *W. 4. c. 76. s. 25*, to vote in the election of a new alderman. As chairman, 7 *W. 4. & 1 Vict. c. 78. s. 14*. would have enabled him to give a casting vote if the numbers, independently of his vote, had been equal, but it did not restore to him the capacity, taken away from an outgoing alderman by the former statute, of giving an original vote. The words of sect. 14 are clear: "and in case of equality of votes among those entitled to vote the mayor or chairman shall have a casting vote, *whether or not he may be entitled to vote in the first instance.*"

R. V. Richards, contra. By stat. 5 & 6 *W. 4. c. 76. s. 69.*, at all meetings of the council, "the mayor, if present, shall preside; and the mayor, or, in the absence of the mayor, such alderman, or in the absence of all the aldermen, such councillor as the members of the council then assembled shall choose to be the chairman of that meeting, shall have a second or casting vote in all cases of equality of votes." There is no ground for saying that this provision is superseded where the mayor who presides is a retiring alderman. [*Cole-ridge J.* By that clause an alderman, if presiding, has a "second" vote. But a person who was simply a retiring alderman could not have an original vote in the election of the new ones. The clause, therefore, cannot be construed literally in all cases.] Sect. 14 of stat. 7 *W. 4. and 1 Vict. c. 78.* is an enabling provision; and this and sect. 25 of the former act must be construed with reference to each other. The clause of sect. 25 taking
away

away the votes of outgoing aldermen must be limited to cases where they act simply in the capacity of aldermen.

1840.

The QUEEN
against
STANLEY.

Sir *J. Campbell*, Attorney General, in reply. The provision for a second vote in stat. 5 & 6 *W. 4. c. 76. s. 69.* must be qualified by the prohibitory clause of *s. 25.*, and cannot receive a literal construction. Sect. 14 of the subsequent act is certainly not a disabling clause; but it explains former enactments, and shews that there may be a mayor not entitled to give an original vote. The case contemplated must be that of a mayor who is an outgoing alderman when aldermen are to be elected.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*May 12th*), delivered the judgment of the Court.

The QUEEN *against* M'GOWAN.

The QUEEN *against* The same.

IN these cases we are of opinion that the meeting appointed to be held on the 9th of *November* in every year for the election of mayor ought to be the first if not the only meeting on that day, and that the first act to be done by it ought to be the election of a mayor. We therefore think that the election of aldermen before that of mayor was void, and that the present defendant in both his capacities has been ill elected, and shews no good title to his office.

Judgment for the Crown.

1840.

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The QUEEN
against
M'GOWAN
&c.

The QUEEN *against* DUDLEY.

IN this case the defendant was elected alderman at the quarterly meeting on the 9th of *November*, before the election of mayor, which is clearly bad.

Judgment for the Crown.

The QUEEN *against* MADDY.

THIS defendant was elected mayor on the 9th of *November*, his election being the first business done. The objection to him is, that two of the persons voting for him were outgoing aldermen; but we think this objection untenable. The outgoing aldermen continue members of the council on the 9th of *November* until, as ought to be the case, the new aldermen are elected on that day, after the election of mayor; and there is no clause disqualifying them from voting for the mayor. In this case, therefore, judgment must be

For the defendant.

The QUEEN *against* STANLEY.

DR. *Maddy*, though an outgoing alderman, was in still, being an alderman, and, as such, one of the council eligible as mayor; and, the election of mayor being the first thing to be done at the quarterly meeting on the 9th of *November*, he was elected mayor.

Being

Being mayor, and so *ex officio* a member of the council, he was competent to give any vote for which he was not expressly disqualified; but any member of the council who is also an outgoing alderman is expressly disqualified from voting in the election of the new aldermen: Dr. *Maddy* was still an outgoing alderman, and subject to this disqualification: he could not, therefore, vote originally for the defendant's election as alderman. As he could not vote originally for him, the case never arose in which he could give a casting vote for him as mayor.

It follows, therefore, that the defendant was not duly elected: and the judgment must be for the Crown.

Judgment for the Crown.

1840.

The QUEEN
against
M^r. GOWAN
&c.

1840.

Tuesday,
May 5th.

MITCHEL *against* EDE and Others.

M., a planter residing in *Jamaica*, being the owner of sugars, the produce of his estate there, and indebted to defendant, who resided in *London*, for more than their value, shipped them at *Jamaica*, on 4th *April*, on board a ship belonging to defendant, which was in the habit of carrying supplies to *Jamaica*, to the estates of *M.* and others, and taking back consignments from *M.* and others, and was then employed in that course.

On 4th *April*, the captain signed, and handed to *M.*, a bill of lading, by which the sugars were to be delivered to defendant at *London*, he paying freight.

On 6th *April*, *M.* made an indorsement on the bill that the sugars were to be delivered to defendant only on condition of his giving security for certain payments, but otherwise to plaintiff's agent.

On the same day *M.* indorsed the bill of lading and delivered it to plaintiff, to whom he was indebted in more than the value of the sugars; and the bill was never in defendant's hands.

During *February* and *March* *M.* had written letters to defendant, advising that the ship would sail with the sugars in question and others, directing him to insure the cargo, and advising him of bills drawn in favour of *B.* on account of the estates producing the sugars in question. And on 4th *April*, *M.* had written to plaintiff desiring him to secure himself for his balance with the produce of those estates.

The sugars arrived in *London*; and defendant paid the bills drawn in favour of *B.*, but did not comply with the condition of the indorsement made on 6th *April*.

Held, that plaintiff was entitled to the sugars, for that,

(1) *M.* had not parted with the property by delivering it on board defendant's ship so employed as above stated.

(2) Nor by accepting the bill of lading, as drawn on 4th *April*, from the captain; *M.* being entitled to change the destination of the sugars till he had delivered them or the bill.

(3) And that the letters to defendant did not shew an intention to consign the specific property to him.

(4) That, for these reasons (strengthened by the proof of intention in *M.*'s letter of *April* 4th) the indorsement to plaintiff passed the property.

moreland;

moreland, but the plaintiff was to have a verdict whether he or Messrs. *Stewart and Westmoreland* should be the proper formal party or not.

The plaintiff is a merchant, residing at *Kingston* in *Jamaica*; the defendants are *West India* merchants residing in *London*, and owners of the ship *Thisbe*.

The sugars in question were shipped by *John Mackenzie*, a planter resident in *Jamaica*, on various occasions between 18th *February* and 4th *April*, 1832, on board the *Thisbe*, then lying at *Port Morant*, in *Jamaica*, and bound for *London*, under the following bill of lading, signed by *James Weeks*, who then and for years before was and had been captain of the *Thisbe*.

“Shipped in good order and condition by *John Mackenzie Esq.*, in and upon the good ship or vessel called the *Thisbe*, whereof *James Weeks* is master for this present voyage, and now lying” &c., “and bound for *London*, viz. 150 hogsheads of muscovado sugar, being marked” &c., “and are to be delivered in the like good order and condition at the aforesaid port of *London* (all and every the dangers” &c. “excepted), unto Messrs. *Ede, Bond, and Pearce*,” (the defendants) “or to their assigns, he or they paying freight for the said goods at the rate of 5s. sterling per cwt. for sugar, with average accustomed. In witness whereof” &c. “Dated in *Jamaica*,” 4th *April* 1832.

The bill of lading was indorsed as follows.

“The within sugar will be delivered to Messrs. *Ede, Bond, and Pearce*, on condition only that they give security to Messrs. *A. Stewart and Westmoreland* that they will pay the bills for advances that *Hector Mitchel Esq.*” (the plaintiff) “has made or may make to me, or for account of *Air Mount and Harbour Head* estate;

1840.

MITCHEL
against
EDE.

1840.

MITCHELL
against
EDR.

otherwise the 150 hogsheads of sugar within mentioned will be delivered to Messrs. *A. Stewart and Westmoreland*; but, if they give that security, then all other shipments of sugar from those estates will go to them free and unshackled. *Kingston, 6th April 1832. — John Mackenzie.*"

John Mackenzie was the owner and in possession of the two estates in *Jamaica*, called *Air Mount* and *Harbour Head*, mentioned in the foregoing indorsement, and was also in possession of another estate called *Amity Hall*, as manager, and was the attorney for other properties in the island. The sugar was the produce of the *Air Mount* and *Harbour Head* estates, in the following proportions, viz., eighty hogsheads from *Air Mount*, and seventy from *Harbour Head*.

On 17th *February* 1832, *Mackenzie* wrote to defendants a letter, of which the following is an extract.

" *Port Morant, February 17th, 1832.*

" The *Mars* has arrived and delivered her cargo of coals, and will be dispatched positively on the 25th instant. There is a slight alteration in her cargo," &c. " I have also to announce the safe arrival of the *Thisbe*, with the supplies, which are nearly all landed. She will sail in the first week in *April*; and you will please insure as follows. *Winchester*, 120 hogsheads and 20 tierces; *Amity Hall*, 120 hogsheads and 50 tierces, sugar, and 70 puncheons of rum; *Georgia*, 40 hogsheads; *Air Mount* and *Harbour Head*, 160 hogsheads. You will also insure on the *Paragon* 50 puncheons of rum, on account of *Air Mount* and *Harbour Head*, if not previously advised. The accounts and lists are in a state of preparation, and will be sent by the first opportunity."

On

On 19th *March* he wrote a letter, of which the following is an extract, to defendants.

“ *Kingston, March 19th, 1832.*

“ The *Mars* sailed on the 25th ultimo, and the *Thisbe* will between the 5th and 10th proximo ; her cargo will be as follow : 120 hogsheads, 50 tierces, and 80 puncheons, *Amity Hall* ; 150 hogsheads, *Air Mount* and *Harbour Head* ; 115 hogsheads, 20 tierces, and 30 hhd., *Georgia*. I shall advise you of other insurances by the remaining packet.” With the following postscript : “ I beg to advise my bills in favour of *James Bryden*, for 1200*l.* sterling, on account of *Air Mount* and *Harbour Head*.”

The two bills in favour of *Bryden* were paid in due course by the defendants ; who also effected insurances, in pursuance of the letter of 17th *February* 1832, on sugar, rum, and molasses, to the amount of 2280*l.*

The plaintiff, previously to the shipment, had made advances to *Mackenzie* for the purpose of defraying the contingent charges on those estates, and for providing stores, and for other purposes connected therewith : and, on 6th *April* 1832, a balance amounting to upwards of 2000*l.*, and exceeding the value of the sugars, was due from *Mackenzie* to the plaintiff : he continued to make similar advances for *Mackenzie* at the time of, and after, the said shipment ; and he also entered into certain liabilities or engagements on behalf of *Mackenzie*, to enable him to leave the said island for the benefit of his health : and it was by means of such advances that *Mackenzie* had been enabled to produce the sugars in question from those two estates. A balance, exceeding the value of the said sugars, is still due to plaintiff on account of such advances.

1840.

MITCHELL
against
EDS.

1840.

MITCHELL
against
EDE.

At the time of the shipment, *Mackenzie* was also indebted to defendants to the amount of 40,000*l.*; which debt still exists, but for which they hold securities. Defendants had a joint account with *Mackenzie* as to the two estates called *Air Mount* and *Harbour Head*, and a separate account as to the *Amity Hall* estate. Defendants also held three bonds, copies of which were annexed to the case (a). There was no proof whether these bonds were registered or not.

Defendants, for some time before *April* 4th, 1832, had been in the habit of sending their ships to *Jamaica*, with supplies to these and other estates in *Jamaica*; they were also in the habit of receiving consignments from *Mackenzie* and other planters in return. These vessels took out and brought home goods from different shippers, when offered. In this instance, the *Thisbe* sailed in the usual course, taking out supplies; and she brought home other produce, shipped by different shippers, besides the sugars in question.

(a) The obligees in all three were two of the defendants, *Ede* and *Bond*. The first was given by plaintiff's deceased father, dated in 1821; the two others by plaintiff and one *Thomas Mackenzie*, being of the same date, in 1823.

The condition of the first recited that the obligees had acted as merchants for the obligor, by supplying his estates in *Jamaica*, and receiving consignments from them, and had advanced money on the credit of such consignments, and would probably advance more: and the condition was for payment of past and future advances, so far as not satisfied out of the produce of the estates already consigned; and for mortgaging the obligor's estates in *Jamaica*, upon request, in security of present and future debts. The second bond was, substantially, like the above, except as to the names of the obligors. The condition of the third recited a contract for the purchase of the *Harbour Head* estate by plaintiff's father, and that the obligees had accepted bills for the price, for which the estate had been mortgaged to them in 1821; and the condition was for indemnifying the obligees from the bills.

The

The captain of the *Thisbe* signed the bill of lading on 4th *April*; and, on the same day, handed it to *Mackenzie*; and on that day *Mackenzie* wrote a letter to the plaintiff, of which the following extract relates to the sugars in question.

“ Any balance that may remain on your account, and the advances you are making for me on *Air Mount* and *Harbour Head* estates, and any liabilities or engagements you enter into, at your discretion, to enable me to leave the island for the benefit of my health, you will secure to yourself with the produce of *Air Mount* and *Harbour Head* estates, when in your judgment it may be convenient.”

On 6th *April* (the date of the indorsement), *Mackenzie* indorsed and delivered the bill of lading to plaintiff. The bill of lading was never in the hands of the defendants. The plaintiff sent the bill of lading to his agents in *London*, Messrs. *Stewart and Westmoreland*, inclosed in a letter dated 9th *April* 1832. The sugars arrived in the port of *London*, in *June* 1832, and were deposited in the warehouses of the *West India Dock Company*.

On 19th *June* 1832, *Stewart and Westmoreland*, as plaintiff's agents, applied to the defendants to comply with the conditions of the indorsement on the bill of lading, which they refused to do, and have never since done. In the same month, both parties gave notices of their respective claims to the *Dock Company*. *Mackenzie* died shortly after the shipment: and, on 31st *July* 1832, a *dedimus potestatem* to act as executor was granted to the plaintiff from the office of ordinary of the island of *Jamaica*.

1840.

MITCHELL
against
EDF.

The

1840.

The case was argued in last *Hilary* term (a).

MITCHELL
against
END

Sir *J. Campbell*, Attorney General, for the plaintiff *Mackenzie* had power to convey the sugars, the produce of his estate, to any person: no debt or mortgage of the estate (which, however, did not exist here) would prevent that. And, if they were not conveyed to the defendants, the indorsement and delivery of the bill of lading to the plaintiff, following the letter from *Mackenzie* to the plaintiff of 4th *April*, clearly transferred the property to the plaintiff. The only question therefore is, whether it had been previously conveyed to the defendants: which brings the question to the effect of the shipment and the bill of lading itself. The ship was a general ship: the delivery of the sugars was therefore not made to the defendants. But the bill of lading, being made out to the defendants, would, if delivered to them, or to any one for them, as the master, certainly have transferred the property to them, according to its terms. The case, however, finds that the bill of lading never was in their possession; which excludes a virtual as well as an actual delivery. The captain indeed signed the bill of lading; but he did not receive it for the defendants. He never held it except for *Mackenzie*, to whom he directly handed it over: the delivery to him would, so far as the defendants are concerned, have no farther effect than a delivery as an escrow. It is not even stated that the captain was requested to sign by *Mackenzie*. Thus the bill could not operate as a symbolical transfer. After *Mackenzie* had received the bill of lading, he indorsed it with the conditions on which it was to be delivered to the

(a) *January 21st.* Before Lord Denman C. J., *Littledale, Patteson, and Williams* Js.

defendants.

defendants. It was not so delivered then; but it was immediately indorsed to the plaintiff. And, even if the indorsement to the defendants be construed as an offer of the sugars actually made to them, it was a conditional offer only, and the condition has never been complied with. Nor is there any lien: for there has been no possession. In *Ogle v. Atkinson* (a) an agent (who was also a debtor) of the plaintiff received an order to purchase goods for him, and delivered them, as plaintiff's goods, on board plaintiff's ship (which had been sent for them), remitting the invoices to the plaintiff: and it was held that this transferred the property to the plaintiff, though the captain, through a misrepresentation by the agent, signed a bill of lading in blank, which the agent indorsed to another party. That decision was on the ground that there was an unqualified delivery to the plaintiff, which could not be affected by the transaction as to the bill of lading. Indeed, as the goods there were purchased for the plaintiff by his agent, the plaintiff had the property before the shipment. The case shews that the bill of lading has no effect when there is a clear act vesting the property. In *Haille v. Smith* (b) goods were shipped; and, in pursuance of an agreement that they should be consigned to a party by way of security to cover drafts to be drawn by the shipper on such party, the shipper indorsed in blank to the same party a bill of lading, and sent it to him with the invoice. The ship was detained by an embargo; and the shipper became bankrupt: but it was held that the indorsees of the bill of lading might recover the goods in trover. There nothing remained to be done to transfer the property: whereas

1840.

 MITCHELL
 against
 EDE.

(a) 5 Taun. 759.

(b) 1 B. & P. 563.

here

1840.

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 Mercantile
 against
 Equ.

here the defendants have never had either bill of lading or invoices ; and there is nothing to shew that the shipment was on their account. So in *Walley v. Montgomery* (a) the sending to a party the invoice made out on his account and risk, and a bill of lading for delivery to him on payment of freight, and a letter advising him that the ship was chartered on his account, was held to transfer the property ; though, the goods having been stopped before they reached the consignee, and therefore no freight having been paid by him, there was some doubt whether the property passed, for want of compliance with that condition. Again, in *Core v. Harden* (b), goods were shipped, which had been purchased on account of the consignee, to whom an invoice was sent with a letter stating such purchase ; and this was held to give him the property, though bills of lading had been signed by the captain, making the goods deliverable to the consignor's own order, and one of the bills was sent, without indorsement, to the consignee, who upon producing it to the captain obtained the goods, and the other bill was transmitted indorsed to the consignor's agent. It was held that these facts, which were insisted on against the consignee, could, at the utmost, only make the captain liable to the consignor for delivering up the goods ; and that the property, as between the consignor and consignee, was in the latter. But in *Sargent v. Morris* (c) the captain acknowledged, by the bill of lading, that he was to deliver the goods to the consignors, and, in their name, to the plaintiff : and the plaintiff, being advised of the shipment, insured, advancing the premiums ; but, it appearing that he had otherwise no

(a) 8 East, 585.

(b) 4 East, 211.

(c) 3 B. & Ald. 277.

property

property in the goods, it was held that he could not sue the shipowners for negligence whereby the goods were damaged. This case is an authority for the plaintiff, and meets any argument which might arise from the fact, found here, that the defendants insured. In *Barrow v. Coles* (a) the bill of lading was annexed to a bill of exchange, drawn by the shipper upon *Voss*, and the bill of lading had an indorsement making the goods deliverable to *Voss*, if he accepted and paid the bill of exchange, but, if he did not, then to the holder of the bill of exchange. *Voss* accepted the bill of exchange, and indorsed the bill of lading for a valuable consideration, but did not pay the bill of exchange at maturity: and it was ruled that the holder of the bill of exchange might maintain trover for the goods against the indorsee of the bill of lading. Here the defendants have, as *Voss* did, failed to comply with the condition in the indorsement of the bill of lading (b).

1840.

 MITCHELL
 against
 EDG.

Sir *F. Pollock*, contra. Whatever effect be given to *Mackenzie's* acts, it is clear that the plaintiff, having taken the bill of lading with notice, held it subject to all claims, legal or equitable, of the defendants, which the bill or indorsement shewed. In *Dick v. Lumsden* (c) it was decided that a party who, knowing of an equitable claim on goods, takes an indorsement of the bill of lading, acquires no property thereby. Such a party is in the situation of one who takes a bill of exchange after maturity. But nothing appears here giving the property to the plaintiff. The letter of 4th *April*, from *Mackenzie* to him, cannot be treated as even an equi-

(a) 3 Camp. 92.

(b) See *Brandt v. Bowlby*, 2 B. & Ad. 932.

(c) 1 Peake, N. P. C. 189.

1840.

—
 Mackenzie
 against
 Len.

table assignment of this specific property. Nor could the indorsement of the bill of lading to the plaintiff give him a property. The bill is merely a contract between the master and shipper, by which the former acknowledges his duty to, and the rights of, the latter. The custom of merchants has, indeed, made such an instrument negotiable; but not with the full consequences of the indorsement of a bill of exchange. But, even in the case of a bill of exchange, if it be drawn payable to *A.* or order, and accepted, and the drawer, before it is delivered to *A.*, retract his purpose, he cannot indorse it over, though he may destroy it. So a bill of lading passes by indorsement of none but the consignee named in it, if there be one. Here the plaintiff does not even appear to have given any consideration for the indorsement. Farther, the property passed to the defendants. The goods were put on board their ship, with a bill of lading making them the consignees. That is a perfect delivery to them. It is argued that the ship was a general one; but that does not appear. A general ship is one that takes the goods of any person willing to ship. Here the primary business of the *Thisbe* was to take out supplies and bring home consignments for the defendants, though the cargo was filled up afterwards by others. She was, as to this transaction at least, the ship of the defendants; and therefore *Ogle v. Atkinson* (a) applies. In that case, as in this, goods of other parties were shipped on freight. The state of things here, antecedent to the shipping, shews that the goods were, substantially, put on board for delivery to the plaintiff, and not merely on freight. On 17th *February*,

(a) 5 *Taunt.* 759.

Mackenzie announces to the defendants the intended shipment, and directs them to insure. On 19th *March* he again announces the shipments, and advises of bills to be drawn against the cargo. On the faith of the consignment of this cargo the defendants pay the bills, and insure. Such a consignment was not revocable. The want of the invoices cannot affect the question. *Haille v. Smith* (a) cannot be distinguished. So in *Inglis v. Usherwood* (b) it was held that the delivery on board a ship chartered by a party was a delivery to such party, though there, under the peculiar law of *Russia*, the right to stop in transitu was upheld. In *Bohtlingk v. Inglis* (c) the stoppage in transitu was allowed, independently of the peculiarity of the *Russian* law; but there, as well as in *Inglis v. Usherwood* (b), it was considered that, except as to stoppage in transitu, the delivery on board the ship for the consignee transferred the property to him. It is said that *Sargent v. Morris* (d) proves that the insurance here does not strengthen the title of the defendants. But that case shews only that, where a consignee has no interest, he cannot sue in respect of the goods, and that his insuring for his principal, after the goods are on board, will not create such an interest. Here the interest is not confined to the insurance; but the whole transaction, including the acceptance and payment of the bills as well as the insurance, which was effected before the defendants had notice that the shipment had been made, shews that the defendants advanced money on the faith of the delivery. And, in *Sargent v. Morris* (d), *Abbott C. J.* said, "A transfer of the property is, however, very different from

1840.

 MITCHELL
 against
 EDK.

(a) 1 B. & P. 563.

(b) 1 East, 515.

(c) 3 East, 381.

(d) 3 B. & Ald. 277.

a transfer

1840.

MITCHELL
against
EDR.

a transfer of the contract." In fact, all that *Mackenzie* did, after the captain signed the bill of lading, was in violation of good faith. He had no power to qualify the transfer by the subsequent indorsement, nor to hand over the bill to the plaintiff, after having advised the defendants of the shipment, and requested them to make advances (which they made accordingly) on the faith of the shipment. Nothing, therefore, passed by what was so done. In *Nichols v. Clent* (a) it was held that possession, sufficient to support a lien, was not given by delivery to the master of a ship, letters being also sent to the party who claimed the lien, stating a consignment to him, and requesting him to accept a bill, which was done, and the bill paid. There, however, the delivery was not on board the ship of the party; nor did the master receive any direction or notice connecting it with such party. Here the master was not bound to sign a bill of lading in favour of any one but the defendants.

Sir *J. Campbell*, Attorney General, in reply. In *Dick v. Lumsden* (b) the bill of lading had been actually sent to the party entitled, though it was not formally indorsed. The property had vested in him. A mere equitable interest would be of no avail here: but it is unnecessary to discuss that question; for the defendants have either a legal property or none. It is true that, as contended on the other side, a bill of lading can be indorsed by the consignee only. But here that which was written on the back of the bill, before the indorsement to the plaintiff, was not, properly speaking, an

(a) 3 Price, 547.

(b) 1 Peake, N. P. C. 189.

indorsement of the bill; it was matter indorsed on it, explaining the bill. The bill, so explained, did not make the defendants consignees; and, till it had been handed to them, it was an inoperative instrument in which they had no interest, and which *Mackenzie* was at liberty to modify as he pleased. The only real indorsement of the bill which took place was that which the case finds to have been made to the plaintiff. The analogy of a bill of exchange has been relied upon; but it is conceded that a drawer may destroy a bill drawn in favour of *A.*, if it has never been communicated to *A.* If so, *Mackenzie* here might have destroyed the bill of lading; and, that being so, the defendants had no interest in it. The correspondence, which has been insisted on, shews only that the defendants were agents for *Mackenzie*, and that he was in their debt: but there is nothing like an assignment of the specific goods. The master, after the goods were shipped, was bound to sign a bill of lading in favour of any party whom *Mackenzie* might name: and this would be so, even if the ship were not a general one. There is no ground for imputing want of faith. The fact, if it existed, should have been found in the case; what is found shews only that *Mackenzie* did not assign to the defendants the security for which they probably wished; but nothing had been done on the faith of that expectation. The plaintiff knew that he took the bill subject to the claim which the defendants would have on the performance of the condition; but this claim never arose. He had notice of no other interest; and no other existed.

1840.

 MITCHELL
 against
 EDG.
Cur. adv. vult.

1840.
—
MITCHELL
against
EDE.

Lord DENMAN C. J. now delivered the judgment of the Court. After reading the case, his Lordship proceeded as follows.

The question upon the facts stated comes shortly to this, — whether, as the original proprietor, *Mackenzie*, was indebted both to the plaintiff and the defendants in a larger amount than the value of the sugars in dispute, the property in those sugars be in the former or the latter? And that will depend upon the legal effect of the transactions which took place in *Jamaica* in the Spring of the year 1832 above referred to.

On behalf of the plaintiff, it was contended that the property in the sugars remained in *Mackenzie* until the indorsement and delivery of the bill of lading on the 6th of *April*, and passed to the plaintiff thereby. For the defendants, that the property passed to them, either by the delivery on board the *Thisbe*, being their ship, or by the signature of the bill of lading by the captain; or, at all events, that no property under the circumstances passed to the plaintiff.

As to the character of the ship, the case states that the defendants were in the habit of sending out their ships to *Jamaica*, with supplies to the estates on which these sugars were raised, and to *others*, and of receiving consignments from *Mackenzie* and *other planters* in return; that these ships took out and brought home goods from *different shippers*, when offered, and that “the *Thisbe* sailed in the usual course, taking out supplies; and she brought home produce shipped by *different shippers*, besides the sugars in question.” This statement, we think, disposes at once of this part of the argument. It seems to us to be impossible to contend that the *Thisbe*, in the present instance, differed in any
respect

respect from any other general ship; and that, therefore, the sugars, after they were on board, remained absolutely under the controul and at the disposal of *Mackenzie*, so far as their having been put on board that ship is concerned.

It now becomes necessary to consider the effect of the bill of lading. This, it was contended in argument, was a *contract* between *Mackenzie*, the owner of the sugars, of the one part, and the defendants by their alleged agent, the captain, on the other; and by virtue thereof that the property passed absolutely to the defendants, upon the signing of the bill of lading by the captain. We think, however, that this argument proceeds upon a misconstruction of the nature and operation of the bill of lading. As between the owner and shipper of the goods and the captain, it fixes and determines the duty of the latter as to the person to whom it is (*at the time*) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose, at any rate before the delivery of the goods themselves or of the bill of lading to the party named in it, and may order the delivery to be to some other person, to *B.* instead of to *A.* This therefore being, as we think it is, the true construction of the bill of lading, and its effect, it is, in our opinion, conclusive against the argument that the property in the sugars was vested in the defendants by the captain's signature of it.

The letters, set out in the case, seem to have hardly any bearing upon the real question. The utmost that can be inferred from the first (of the date of the 17th of *February* 1832) is, that *Mackenzie* then had the purpose of sending the sugars to the defendants; but it contains

1840.

Mitchell
against
Edw.

1840.

MITCHELL
against
EDR.

nothing about the terms on which they were to be delivered, or in what manner they were afterwards to be disposed of. It does, indeed, direct the defendants to insure much property, the produce of *other estates*, besides the 150 hogsheads, the produce of *Air Mount and Harbour Head*. The second letter, of the 19th of *March* following, gives a more correct statement of the cargo of the *Thisbe*, with reference merely, as it seems, to the insurance, but goes no further. The order to insure, however, and the effecting insurances by the defendants accordingly, certainly did not confer upon them the property in those goods, whatever rights of another description might arise to them therefrom. Indeed we are not aware that this point was at all pressed in the course of the argument.

If then, as we think it did, the property remained in *Mackenzie* notwithstanding the delivery of the sugars on board the *Thisbe*, and the signature of the bill of lading by the captain, it follows as a consequence that the plaintiff is entitled to recover by reason of what was done after. On the 4th of *April* (the date of the bill of lading) *Mackenzie* wrote to the plaintiff signifying his purpose to protect and indemnify him for advances made, or to be made, by him to *Mackenzie*. "Any balance that may remain on your account, and the advances you are making for me on the *Air Mount* and *Harbour Head* estates, and any liabilities or engagements you enter into, at your discretion, to enable me to leave the island for the benefit of my health, *you will secure to yourself with the produce of Air Mount and Harbour Head estates, when in your judgment it may be convenient.*" And accordingly, on the 6th of *April*, in furtherance of that undoubted purpose, he indorsed and delivered

delivered the bill of lading to the plaintiff; the case further stating that "the bill of lading was never in the hands of the defendants." The intention of *Mackenzie* to transfer the property to the plaintiff is unquestionable; and we think that, under the circumstances, he has carried that intention into effect.

The cases cited in the argument are clearly distinguishable from the present. In *Haille v. Smith* (a) the parties who were held to be entitled to the property in the goods had the invoice of those goods and the bill of lading transmitted to them. In *Walley v. Montgomery* (b) also, as in the last case, the invoice of the goods, stating them *to be shipped at the plaintiff's risk*, and the bill of lading, were sent to the plaintiff; and much reliance was placed thereon in the judgment of the Court. In *Coxe v. Harden* (c) there had been an actual delivery of the goods to the party by whose order they had been purchased, and at whose risk they had been shipped. In *Barrow v. Coles* (d) the point decided was that the indorsee of a bill of lading, who was apprized, by an indorsement upon it, of the condition upon which alone the indorser could have any property in the goods, gained no title under such indorsement, the condition not having been complied with. In *Ogle v. Atkinson* (e) the goods were purchased for the plaintiff, and were delivered on board his ship, sent on purpose to receive them, *as his goods*; and this was held to vest the property. The cases of *Inglis v. Usherwood* (g) and *Bohtlingk v. Inglis* (h) turned entirely upon the right of stoppage in

1840.

 MITCHELL
 against
 EDL.

(a) 1 B. & P. 563.

(b) 3 East, 585.

(c) 4 East, 211.

(d) 3 Camp. 92.

(e) 5 Taunt. 759.

(g) 1 East, 515.

(h) 3 East, 381.

1840.

MITCHELL
against
EDR.

transitu; the former according to the law of *Russia*, the latter according to our own.

Of the bonds, which form a part of the case, we do not deem it needful to say more than that they do not, in any degree, affect the conclusion at which we have arrived; and that, accordingly, our judgment must be for the plaintiff.

Judgment for the plaintiff.



Monday,
May 4th.

COOKE against FRENCH.

This case is reported, 10 *A. & E.* 131. note (b).

HEAD against BALDREY.

Where a judge is applied to on summons, under *Reg. Gen. Hl.*

4 *W. 4., General Rules and Regulations*, 6, to strike out

counts of a declaration, as founded on the same subject-matter of complaint with other counts of the same, but allows those objected to, on the plaintiff's allegation that he *bonâ fide* intends to establish distinct matters of complaint under each, the plaintiff is liable to loss of costs, by rule 7, even on the counts, so objected to, on which he may have succeeded.

But this only where issues of fact have been tried upon the counts respectively, on which issues a verdict might have passed for or against the plaintiff.

Not, therefore, where, upon one of two such counts, issues of fact are tried and found for the plaintiff, and, upon the other, issues in law only are depending, and nominal damages are assessed at the trial, contingently. Although the Judge who tried the cause certify that the plaintiff did not, *bonâ fide*, intend to establish distinct matters of complaint under the two counts.

(a) See this count, and the pleas to it, more fully stated in *Head v. Baldrey*, 6 *A. & E.* 459.

in

in the whole &c., and would give him time for payment of the money already due, until &c., defendant promised plaintiff to pay him for the said goods, and the sum already due, by accepting a bill at three months. Averment, that plaintiff sold and delivered to defendant twenty one packs on these terms, and consented to give him time &c., and drew a bill on defendant &c., and requested him to pay by accepting it. Breach, that defendant would not pay by accepting &c. or otherwise. The second count was for goods sold and delivered; third count, for goods bargained and sold; fourth count, for interest; fifth count, on an account stated.

Pleas 1. and 2. As to the causes of action in the first count mentioned, special pleas, which were demurred to. 3. As to the residue of the causes of action in the declaration mentioned, non assumpsit. Issue thereon. 4. As to 53*l.* 7*s.* 11*d.*, parcel of the monies claimed in the second count, warranty by plaintiff of so much of the goods as amounted to that price; breach, and return of the goods. 5. As to 703*l.* 4*s.* 6*d.*, parcel of the monies claimed in the second count, payment.

Replication to plea 4, denying the warranty. Issue thereon. To plea 5, denying the payment. Issue thereon.

Before the pleas were pleaded, defendant obtained a summons calling on plaintiff to shew cause why certain counts should not be struck out. On the hearing before *Patteson J.*, it was objected, for the defendant, that the insertion of the first, second, and third counts was contrary to *Reg. Gen. Hil. 4 W. 4., General Rules and Regulations*, 5 (a). The plaintiff abandoned the count

1840.

 HEAD
against
BALDREY.

(a) 5 B. & Ad. ii.

1840.

HEAD
against
BALDREY.

for goods bargained and sold, but alleged that the first and the second count were for different causes of action. The learned Judge made the following order. "Upon hearing" &c., "I do order that the count for goods bargained and sold be struck out, and that all the other counts do stand, as I am satisfied that the plaintiff bonâ fide intends to establish some distinct subject matter of complaint in respect of each of such counts."

On the trial at the *Suffolk* Spring assizes, 1835, the plaintiff's counsel took an assessment of nominal damages on the first count, and the following verdict was given. "For the plaintiff; 1s. damages on the first count; 534*l.* 7*s.* 11*d.* on the other issues. Costs 40*s.*" On June 9th, 1835, *Vaughan* J., on summons, and hearing the parties, made his certificate, "That the plaintiff did not bonâ fide intend to establish some distinct subject matter of complaint in respect of each of the counts in his declaration, and that the only subject matter of complaint which the plaintiff bonâ fide intended to establish was the non-payment of the sum of 534*l.*, being the amount of ten sheets of wool sold and delivered," &c. By a subsequent order, made November 16th, 1835, on summons and hearing, *Vaughan* J. directed that the postea should be amended by confining the verdict for 534*l.* 7*s.* 11*d.* to the count for goods sold and delivered, and finding a verdict for the defendant on the counts for interest and on an account stated.

The demurrers were argued in *Hilary* term, 1837, and judgment given, in the *Easter* term following, for the defendant (a). The costs were afterwards taxed (b).

(a) *Head v. Baldrey*, 6 A. & E. 459.

(b) For a motion made pending taxation, see *Head v. Baldrey*, 8 A. & E. 605.

The Master allowed the defendant his costs on the demurrers, the count struck out, and the counts on which he obtained a verdict. The defendant's attorney then urged that, by *Reg. Gen. Hil. 4 W. 4., General Rules and Regulations*, 7 (a), the plaintiff was not entitled to any costs of the count on which he had succeeded; but the Master held otherwise, and made his allocatur giving those costs. The plaintiff, therefore, obtained the general costs of the cause, with a deduction only of the costs allowed the defendant as above stated.

A rule nisi was obtained in *Trinity* term, 1839, for reviewing the taxation. In the present term (b),

1840.

HEAD
against
BALDEY.

Kelly and *Ogle* shewed cause. The rule, 7, here relied upon, takes effect only where a plaintiff, on application by the defendant, under rule 6, has been allowed to retain two or more counts, but has failed, upon the trial, to establish a distinct subject matter of complaint in respect of each count. Here the issues on which the parties went to trial related to three counts only; for goods sold and delivered, for interest, and on the account stated. No issue of fact had been joined on the special count; and therefore the Judge at *Nisi Prius* could not enquire whether that count related to a subject matter distinct from the subject matter of the second: the plaintiff could offer no proof under it: all that could be done was to take a verdict for nominal damages. There was, therefore, no failure to establish distinct grounds of complaint under the first and second counts; and, as far as these are in question, the cer-

(a) 5 B. & Ad. iv.

(b) May 4th. Before Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

tificate

1840.

 HEAD
 against
 BALDREY.

tificate of *June* 9th was made without jurisdiction. And *Vaughan* J., in making that certificate, could not properly take into consideration the counts for interest and on an account stated, because, by rules 6 and 7, the jurisdiction to certify is founded upon the fact of the counts, mentioned in the certificate, having been allowed by a Judge on motion to strike them out. Here the counts for interest and on the account stated were not objected to before *Patteson* J., and, therefore, cannot be looked upon as included in his order. [*Patteson* J. The account stated was admissible, by rule 5.] To satisfy rule 7, there ought to have been some count, allowed under rule 6, on which the finding has been against the plaintiff: how, otherwise, is the defendant to obtain "the costs occasioned by such count," which the first part of rule 7 awards to him? It is evident in this case that the verdict could not have passed for the plaintiff, if he had not proved under the second count a distinct cause of action from that relied upon in the first. Supposing the verdict on the count for interest to be material, the finding on that count was originally for the plaintiff. [*Patteson* J. No evidence appears to have been offered on that count; the Judge, therefore, might amend the verdict according to his notes.] He had no power to amend after the time had elapsed for moving to have a new trial. And the validity of the certificate must rest upon the state of the record when it was made. It is, perhaps, at any rate, a hard construction of rule 7, that the plaintiff should lose the whole costs of the cause. [*Patteson* J. I have no doubt that he would do so, in a case within the rule. It is not because he does not succeed on certain issues, but because he has practised a deception on the Judge.]

W. H. Watson,

W. H. Watson, contra. The second count was clearly for a cause of action identical with a part of that comprised in the first. The argument for the plaintiff on demurrer shews it (a). [*Patteson J. Reg. Gen. Hil. 4 W. 4., General Rules and Regulations, 5 (b)*, expressly states that counts for not accepting a bill of exchange, according to contract, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.] And rule 7 is peremptory, applying to "all cases" in which a count, objected to under rule 6, shall have been allowed, and the Judge before whom the trial is had shall certify that no distinct subject matter of complaint was bonâ fide intended to be established. [*Coleridge J.* The question is, whether there must not have been a trial of the several issues.] The plaintiff here has multiplied counts in order to give himself an advantage; he raises a question of law on the first, and goes to trial upon issues of fact on the second. That is the kind of proceeding which rule 7 was intended to prevent. The Judge may determine, from the evidence before him at Nisi Prius, whether or not the case calls for a certificate under rule 7. [*Patteson J.* The Judge has not necessarily the evidence requisite for deciding this, where one count is demurred to and contingent damages only assessed upon it. And your argument would apply to the case of two pleas, where the Judge is even less likely to have the evidence before him as to the plea demurred to. But, to bring a case within the rule, it must appear, by the evidence at the trial, that the counts or pleas turned upon the same subject matter.] If the plaintiff's objec-

1840.

HEAD
against
BALDREY.

(a) *Head v. Baldrey*, 6 A. & E. 463.

(b) 5 B. & Ad. ii.

1840.

HEAD
against
BALDREY.

tions to this certificate were well founded, he should have moved to set it aside. [*Coleridge J.* I doubt if we should have the power. In cases under stat. 43 *Eliz. c. 6. s. 2. (a)*, I think the course is to move to tax costs notwithstanding the Judge's certificate. Lord *Denman C. J.* We will speak to the other Judges on this case.]

Cur. adv. vult.

Lord DENMAN C. J. in this term (*May 13th*) delivered the judgment of the Court.

Upon reading the seventh rule of *Hilary term, 4 W. 4. (b)*, we are of opinion that it must be taken as one and entire; that the latter part, which enacts very penal consequences where a Judge on a trial certifies that a plaintiff did not bonâ fide intend to establish distinct subject matters of complaint in respect of each count, can only be acted on in those cases to which the early part of the rule applies, viz. where the plaintiff at the trial fails to establish a distinct subject matter of complaint in respect of each count, and a verdict passes against him upon one. In this case no issue of fact arose out of one of the two counts in question: the plaintiff was not called upon to establish two distinct subject matters of complaint; he succeeded upon one count, and there could not be a verdict against him on the other, upon which he was entitled to have nominal damages assessed contingently without giving any evidence. It follows that the Judge had no power to grant the certificate in question, and that the Master was right in taxing the costs in the same manner as if no such cer-

(a) See stat. 3 & 4 *Vict. c. 24.*

(b) 5 *B. & Ad. iv.*

tificate

tificate had been in fact given. The present rule must therefore be discharged.

1840.

Rule discharged (a).

HEAD
against
BALDREY.

(a) See the next case.

The following case may properly be added here.

DEWAR and Others *against* SWABEY and
Another.

[June 17th,
1841.]

ASSUMPSIT. The declaration contained counts: Where, on
1. On special facts (a). 2. For money had and summons,
received. 3. On an account stated. The defendants under *Reg.*
4 *W. 4., General Rules and Regulations, 6,*
took to strike out a

count, as founded on the same subject matter of complaint with other counts of the same declaration, a judge allows the count objected to, on the plaintiff's allegation that he *bonâ fide* intends to establish distinct matters of complaint under each; if the plaintiff succeeds only on the count so allowed, and the Judge at *nisi prius* certifies that it was not *bonâ fide* intended to establish distinct matters of complaint on the several counts, such plaintiff, under Rule 7, is liable to pay defendant's costs of the issues found for him, and is not himself entitled to any costs of the cause. *Per Coleridge J.* Except costs of a special jury, if a certificate be given for that purpose.

In such a case it is too late, after taxation of costs, to object that the Judge, on the summons, had not jurisdiction to allow or disallow the counts, inasmuch as they were not pleaded in apparent violation of Rule 5.

If there be three counts, and, on summons, counts 1 and 2 are objected to, but allowed on the ground of plaintiff's intention to prove distinct matters of complaint on each, and plaintiff at *nisi prius* succeeds on count 2, but fails on counts 1 and 3, a certificate, under Rule 7, that plaintiff did not intend to prove a *distinct matter of complaint in respect of either of the counts on which he has failed*, is insufficient to deprive him of costs.

(a) This count stated that certain treasure had arrived in *England*, and had been arrested on the part of the Crown, as a droit of Admiralty; that plaintiffs claimed such treasure, and the Court of Admiralty decreed that it belonged as claimed, and should be restored to the claimants on payment of salvage and expences and the expence incurred on behalf of the Crown in the office of Admiralty, or on bail being given to answer the same. That it was lawful for the claimants, according to the practice of the said Court, to adopt any one of three courses, which the declaration stated. That defendants were deputy registrars of the said Court, and, as such, entitled, in the event of the claimants adopting the course thirdly stated, but not otherwise, to certain poundage on the proceeds of the sale of such treasure. That, in consideration that plaintiffs would

[1841.]

DEWAR
against
SWABBY.

took out a summons to shew cause why the first or second count should not be struck out. On the hearing, before *Patteson J.*, the plaintiffs' counsel alleged that the plaintiffs intended to make a bonâ fide claim under each of these counts; whereupon the learned Judge indorsed the summons as follows. "Summons dismissed, I being satisfied, upon the cause shewn, that some distinct subject matter of complaint is bonâ fide intended to be established in respect of each of the counts."

The defendants pleaded Non assumpsit to the whole declaration, and a plea to the first count, traversing the breach of promise. Issues being thereon joined, the parties went to trial. A verdict was taken for the plaintiff, subject to the award of a barrister, who was empowered to certify for a special jury, and likewise to certify, as a Judge at Nisi Prius might have done, "that no distinct subject matter of complaint was bonâ fide intended to be established in respect of each count:" the costs of the cause to abide the event of the award.

The arbitrator awarded "That the verdict so taken be altered and be entered as follows: for the defendants upon the first and last counts of the declaration, and upon the second plea to the first count: for the plaintiffs upon the second count of the declaration, damages 395*l.* 10*s.* 8*d.*:" and he certified that the cause was fit

would proceed to sale, and forbear adopting either of the first two courses, defendants promised them to claim and retain poundage on one half only of such proceeds, and abandon the residue. Averment that plaintiffs forbore to adopt either of the first two courses, and did adopt the third, which was proceeded in, as the declaration particularly stated, and sale made, and proceeds paid into the registry, and an order of the said court made for paying them out to plaintiffs, subject to the charges above mentioned. Breach, that defendants did not nor would claim and retain half commission only, but claimed and retained commission on the whole proceeds, &c.

to

to be tried by a special jury, and "that no distinct subject matter of complaint was bonâ fide intended to be established in respect of either of the counts upon which the plaintiffs have failed." On the taxation of costs, in *March* 1841, the defendants insisted that, on this certificate, the plaintiffs were liable to pay defendants the costs of the issues found for them, and were not entitled to any costs upon the issue found for themselves. The Master taxed the plaintiffs their costs of the cause, including those of the issue found for them, but disallowing those which related to the issues found for the defendants, subject to the opinion of the Court on the questions, what costs the plaintiffs were entitled to, and what was the effect of the certificate as to two counts. A rule nisi was obtained for reviewing the taxation. In *Trinity* term, 1841 (*a*),

[1841.]

DEWAR
against
SWABBY.

Cresswell and *J. Greenwood* shewed cause. This is not a case within *Reg. Gen. Hil. 4 W. 4. General Rules and Regulations*, 7 (*b*), because the counts to which the Judge's order applied were not, as Rule 6 expresses it, "used, in apparent violation of the preceding rule." It was not "apparent" that the first and second counts were (in the words of Rule 5) "founded on one and the same principal matter of complaint;" and therefore the rules did not warrant an application to the learned Judge to strike out one of those counts; and the order for retaining them, by which the plaintiff was subjected to loss of costs in the case pointed out by Rule 7, ought not to have been granted. [*Coleridge* J. Should not you have applied to the Court when the order was made?]

(*a*) June 12th. Before Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge* Js.

(*b*) 5 B. & Ad. iv.

That

[1841.]

DEWAR
against
SWABBY.

That could not well be done, the order being ostensibly in plaintiff's favour. [*Coleridge J.* The order was, that you should retain the counts, only taking the consequences if you failed to prove distinct grounds. You accepted the order with the risk.] To apply to the Court would have been merely to ask that the Judge's reason for allowing two counts might be rescinded. [*Patteson J.* You might have said at chambers, "we insist on keeping the two counts without the peril:" but then, probably, one would have been struck out. *Coleridge J.* You assume that "apparent" means something shewn on the face of the counts themselves. But the counts may be ostensibly different, as, for goods bargained and sold, and for goods sold and delivered, and yet it may be evident that the subject matter is the same in both.] *Temple v. Keily (a)* and *Vaughan v. Glenn (b)* shew that this must appear distinctly on the record, to warrant an application of the rules. [*Patteson J.* You might have made the same application to the Court, which was made in *Temple v. Keily. (a)*] Rule 5 affords instances in which there may be different counts, although the plaintiff cannot, from the nature of the subject matter, recover on both. [*Coleridge J.* If your argument be admissible, you must say that the Master, on taxation, may examine the propriety of the Judge's order made under Rule 6. Lord *Denman C. J.* It is making the Master a judge of the order.] He must decide upon the certificate as he finds it. If it be at variance with the rules, he ought to give it no effect. [*Patteson J.* No order of this kind can be made unless the party answering the summons explains how it is intended to prove distinct subject matters. The Judge decides upon that statement. If the party wishes to oppose the step taken, he should come

(a) 9 *Dowl. P. C.* 62.(b) 8 *Dowl. P. C.* 396.

promptly

promptly to the Court. After having acquiesced, he cannot complain.] If the Court think it no longer open to the plaintiffs to contend that the counts are not "in apparent violation" of rule 5, that argument of course fails. [Lord *Denman* C. J. I think there is no doubt of it, looking to the plain words of the rule, and the manifest convenience of all parties.]

[1841.]

DEWAR
against
SWABEY.

Then, further, the arbitrator's certificate is imperfect. He was required to certify (if such was his opinion) that no distinct matter of complaint was intended to be established under each of the counts allowed on summons, namely, the first and second. But he certifies only as to the counts "upon which the plaintiffs have failed;" those are the first and third. This refers to one of the counts allowed; but does not shew that the matters intended to be proved under that count and under the second were not distinct from each other.

Supposing the decision to be against the plaintiffs on these points, they ought not to lose their general costs, but only those of the pleadings on which they have recovered, and of this application. It cannot have been intended, by rule 7, to deprive the plaintiff in such a case as this of the entire costs of the cause. [Lord *Denman* C. J. It is a very strong rule, and was much discussed at the time of making it. *Patteson* J. I always explain to parties, on these occasions, the peril they are in.] It is ascertained, here, that the plaintiffs had sustained an injury and acquired a right of action, and that the cause was a fit one to be tried by a special jury. It cannot be just that they should lose all the costs. [*Patteson* J. The Master seems to have disregarded the second clause of rule 7.] The clause is highly penal, and should therefore be limited to the

[1841.]

 DEWAR
 against
 SWABBY.

"costs upon the issue or issues," in the strictest sense, on which a plaintiff may have succeeded. [*Patteson J.* You read it as if the words were "costs of the issue."] That is the reasonable construction. The rule was probably framed in contemplation only of cases where, though the plaintiff might lose his costs on a particular issue or issues as to which he succeeded, there was some issue, unaffected by the rule, on which he would recover his general costs.

Peacock, *contra*. The plaintiffs' counsel was warned on the summons that he would be required to prove distinct matters of complaint on the first and second issues. The effect of satisfying the Judge that such proof will be given, and afterwards failing to do so, is the loss of all the costs. [*Patteson J.* The counts allowed on the summons were the first and second: the arbitrator has not mentioned the second.] He has done what was equivalent. The plaintiffs succeeded on the second count: then all that was necessary for the arbitrator to state was, that they had not intended to establish a distinct cause of action under the first. He does state that, but adds, unnecessarily, that there was not such a *bonâ fide* intention as to the third count. [*Patteson J.* The case put by rule 7 is, if the Court or Judge "shall be of opinion that no such distinct subject matter of complaint was *bonâ fide* intended to be established in respect of *each count so allowed*." That means, here, "distinct" as between the first count and the second. The matters might, on a comparison between those counts, be distinct, though not so on comparison of the first and third.] As to costs, the plaintiffs here must lose the general costs, because there is no
 issue

issue on which they can be recovered : had there been a fourth count, not in question on the summons, on which the plaintiffs had succeeded, they might have been entitled to the costs of the cause. Here there is no issue on which they can obtain them. [*Coleridge J.* This result of the cause will not affect the costs of the special jury.] On the whole result the plaintiffs will not have succeeded. [*Coleridge J.* They have not failed for this purpose. They have the verdict. The costs of the special jury are not inseparably connected with those of the issue on which they have succeeded.]

[1841.]

DEWAR
against
SWARTY.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

In this case the indorsement on the summons for striking out either the first or second count allowed them both to stand, the Judge being satisfied that some distinct subject matter of complaint was bonâ fide intended to be established in respect to each. The summons did not apply to the third count at all. The arbitrator, to whom the cause was referred with the same power of certifying as to the counts that a Judge would have had, has directed a verdict for the plaintiff on the second count, and for the defendant on the first and third counts, and certified his opinion that it was not bonâ fide intended to establish a distinct subject matter of complaint in respect of either of the counts on which the plaintiff has failed, that is the first and third ; but he makes no mention of the second.

Now his certificate, by the rule of Court, is to be confined to those counts which have been allowed by the Judge ; it should, therefore, have been confined to the first and second. By introducing the third, and

[1841.]

DEWAR
against
SWABBY.

omitting any express mention of the second in his certificate, he has confused the matter, and rendered it doubtful what he really means. The word "distinct," in the indorsement, institutes a comparison between the first and second: the word "distinct" in the certificate may be intended to do the same; but it does not in express terms do so: and therefore we think it unsafe to give effect to the certificate by reason of an ingenious argument by which it was attempted to shew that it was so intended. Under these circumstances we think that the Master was right in giving no effect to the certificate.

With respect to the effect of it, if it had been properly framed, we have no doubt that, as the plaintiff succeeded on no issue but that to which the certificate would have related, the plaintiff would have been deprived of all the costs of the cause.

Rule discharged without costs.

Friday,
May 8th.

BAYLIS *against* LAWRENCE.

On the trial of an issue of Not guilty in an action for libel, it is no misdirection if the judge leaves to the jury the question, whether or not the publication be libellous, without stating his own opinion as to the particular publication, or defining what generally constitutes a libel.

CASE. The declaration stated that, before and at the time &c., plaintiff had held a farm, as tenant to *Thomas Jones*, adjoining to lands of defendant: that, for a long time, towit five years, before, and at, the time &c., plaintiff had not obtained any certificate rendering it lawful for him to use any dog, net, &c., for taking or killing game, yet defendant, well knowing &c., and maliciously intending to injure plaintiff &c., and to cause it to be suspected and believed that plaintiff had been and was guilty of the offences after mentioned to have been imputed

imputed to him, and to vex, harass, oppress, impoverish, and wholly ruin plaintiff, heretofore, towit on &c., falsely and maliciously did publish &c., of and concerning plaintiff, and of and concerning his conduct as such tenant of the said farm, a certain false, malicious, &c., libel, in the form of a letter to the said *Thomas Jones*, containing &c. The declaration then set out part of the letter, with innuendoes. Pleas. 1. Not guilty. 2. A justification.

On the trial, before Lord *Abinger* C. B., at the *Gloucestershire* Summer assizes, 1838, the publication was proved. The letter, which was directed to *Jones*, and signed by defendant, was as follows.

“ Dear Sir, — I am sorry to be obliged to make a complaint against a tenant of yours; but I really am so annoyed and injured by the way in which *Baylis* has conducted himself of late, and which behaviour I am sure you would never countenance, that I cannot any longer refrain from writing to you to request your interference on this point. For two years *Baylis* professed to aid me, as far as he could, in the preservation of game on his farm; and it is only within the last six months, owing to his failing to obtain the refusal of my *Halling Wood* farm from me, that I have learnt his true character. Not a hare that has ever come into his ground has, once in ten times, returned to my covers; for his nephew and farming men are not only constantly wiring, but lying in wait to shoot them, as both I myself and my keeper have frequently seen. This, I am confident, from what I myself know, and have been assured on very good authority, is done with his knowledge and consent; and it is, I think, most improper and unjustifiable conduct on his part. He had always

1840.

BAYLIS
against
LAWRENCE.

1840.

—
 BAYLIS
 against
 LAWRENCE.

my permission to ask my keeper for game when he wished for it; and I always gave him a day's shooting when asked for. This winter I have not found a single hare or pheasant on his farm, where formerly I could have killed nine or ten in a day: and I myself, and others, have found hares lying dead in my grounds with his wires round their necks. He has also warned my keeper off his grounds; and, in short, has done all he can to annoy me. If I were not positively convinced of the truth of what I state, I should be the last to mention any thing of the sort; but, however he may deny the fact, I feel most certain that he alone is the instigator of these underhand transactions. I am sorry to be obliged to make such complaints, as my constant wish is to live in good will with all my neighbours; but, when I see a man, who ought to know better, acting in this improper and disgraceful manner to a gentleman who has always endeavoured to be on good terms with him, I cannot help expressing my feelings on the subject."

The evidence did not support the justification. With respect to the first issue, the Lord Chief Baron said to the jury, "I own I find a difficulty in saying whether it is a libel or not. Gentlemen, can you assist me?" His Lordship gave no other direction as to the first issue. Verdict for the defendant on that issue; for the plaintiff on the other. In *Michaelmas* term 1838, *W. J. Alexander*, for the plaintiff, obtained a rule nisi for a new trial, on the ground of misdirection.

R. V. Richards and *Whateley* now shewed cause. The Judge is not bound to tell the jury his opinion whether the publication be libellous or not: that is a fact depending on intention, and frequently shewn by many circumstances,

circumstances, the result of which is for the jury. No offence is, in fact, charged by the letter in question: for the tenant, if there be no agreement to the contrary, has a right to the game on the land which he holds. But, at any rate, the Judge was entitled to leave the matter to the jury. By stat. 32 G. 3. c. 60. s. 1. the jury, on a plea of Not guilty to an indictment for libel, may give a general verdict on the whole matter, and are not bound to find the defendant guilty on mere proof of publication and of the sense ascribed to the alleged libel; and, by sect. 2, the Court or Judge "shall, according to their or his discretion, give their or his opinion and directions to the jury." That statute, it is true, is applicable to criminal cases only: but its intention was to make the law of libel, in this respect, uniform in criminal and civil cases: it was a declaratory act, passed to remove doubts which had existed whether the rule was not different in criminal and in civil law. It was expressly decided in *Parmiter v. Coupland* (a), by the Court of Exchequer, that the judge was not bound to tell the jury whether he thought the publication libellous or not.

1840.

 BATTLIS
 against
 LAWRENCE.

W. J. Alexander, contra. It is not necessary to contend that a judge is bound to tell the jury his opinion whether the particular publication be a libel; but he is at least bound to explain to them what it is that constitutes a libel. If that had been done in the present case, the jury must have found for the plaintiff; for no proper definition of a libel could exclude this publication. In *Haire v. Wilson* (b) the Judge left it to the jury whether the defendant intended to injure the plaintiff by the publication: and this direction was

(a) 6 M. & W. 105.

(b) 9 D. & C. 643.

1840.

 BAYLIS
 against
 LAWRENCE.

held wrong, Lord *Tenterden* saying that, "if the Judge thought the tendency of the publication injurious to the plaintiff, he ought to have told the jury it was actionable, and that the plaintiff was entitled to a verdict." That doctrine was confirmed in *Fisher v. Clement* (a). Stat. 32 G. 3. c. 60. was passed to do away with a doctrine which had prevailed in criminal cases, that judges could decide absolutely whether a given publication was a libel or not: the law in civil cases was left untouched.

Lord DENMAN C. J. This rule was granted for the purpose of settling the practice. Two cases have been cited, in which this Court is supposed to have held that the Judge must tell the jury whether the publication be a libel or not. I think that, when these cases are properly considered, they do not go so far. They shew that a judge must not leave the fact of the defendant's intention as a question for the jury, except so far as the intention may be shewn by the tendency of the publication itself. A man may wilfully publish a mischievous libel without intending to injure the party, yet may be responsible. He may indeed, in effect, do him no harm by the publication; for it may be that blame from some quarters is more valuable than praise. Yet he must answer for such a publication. I have always followed the practice adopted in this case by Lord *Abinger*, leaving the jury to say whether, under all the circumstances, the publication amounts to a libel. That practice is analogous to the enactments of stat. 32 G. 3. c. 60. The statute, indeed, is applicable only to criminal cases; but it was a declaratory act; and the

(a) 10 B. & C. 472.

importance of declaring the law existed only in the case of criminal libels. The act therefore furnishes clear evidence that the Judge is not, in civil cases, bound to state his opinion whether the publication be libellous or not : and this agrees with the late decision of the Court of Exchequer in *Parmiter v. Coupland* (a). There is, indeed, one case in which a pure question of law may arise. If the judge and jury think the publication libellous, still if, on the record, it appear not to be so, judgment must be arrested.

1840.

BAYLIS
against
LAWRENCE.

LITLEDALE J. I am entirely of the same opinion. It was at one time thought that the jury had nothing to do with the question as to the nature of the publication, upon the trial of an indictment. Then stat. 32 G. 3. c. 60. was passed, declaring that the jury might find a general verdict on the whole matter, with liberty to the judge to give his opinion at his discretion. Although that act applied more particularly to criminal cases, yet I know no distinction between the law in criminal cases and that in civil, in this respect. Therefore that which has been declared to be law in criminal cases is the law in civil cases ; and the Lord Chief Baron was entitled to do as he did.

PATTESON J. Upon examining the cases cited in support of the rule, it appears from them, only, that it is a misdirection to leave to the jury the intent as a general question of fact, because the defendant must be taken to intend that which is the obvious consequence of his publication. Here the Judge merely abstained

(a) 6 M. & W. 105.

1840.

—
BAYLIS
against
LAWRENCE.

from giving any opinion as to the publication. A judge is, of course, not precluded from giving his opinion; but it is nowhere laid down that he is bound to do so. The question does not, I think, differ from many other questions of fact; from that, for instance, which arises in a horse cause, when veterinary surgeons give opposite opinions on the question whether a particular defect constitutes unsoundness.

WILLIAMS J. If the judge had withdrawn altogether from the jury the question as to the nature of the publication, that would have been a misdirection. But, supposing he had given the ordinary definition of a libel, he must still have left it to the jury, whether the particular case fell within the definition.

Rule discharged.

Saturday,
May 9th.

BAMFORD *against* SHUTTLEWORTH, Gent.,
One, &c. and Others.

On sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchaser, and by the vendor's attorney, subscribing himself as "agent for the said S. S.,"

the vendor. The purchaser paid his deposit to the attorney, who gave a receipt, signed by himself as "agent for S. S." The sale going off through the vendor's default, and the deposit money not being returned,

Held, that the purchaser could not bring an action of money had and received against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor.

ASSUMPSIT for money had and received, and on an account stated. Particular of demand, for "16*l*. money had and received by the defendants for the use of the plaintiff, as a deposit on the purchase of property by the plaintiff in *July* 1837." Plea, Non assumpsit. Issue thereon. On the trial, before *Williams J.*, at the *Liverpool* Summer assizes, 1838, the following facts appeared.

The

The defendants, attorneys in partnership at *Rochdale*, were employed by *Saville Stott* to sell some leasehold premises for him. They accordingly caused the property to be sold, by auction, in *July 1837*; the plaintiff bought one of the lots at the auction, and a memorandum, subscribed to the conditions of sale, was signed on behalf of the vendor and purchaser, as follows.

1840.

BAMFORD
against
SHUTTLE-
WORTH.

“Memorandum. I, the undersigned *Richard Clegg*, auctioneer and agent for *Charles Bamford* of *Mount Green*, agree to become the purchaser of the above premises, and I, the undersigned *Richard Shuttleworth*, agree to sell the same to him, under and subject to the foregoing terms and conditions, at the price or sum of 160*l*. As witness the hands of the said parties, the 5th day of *July 1837*.

(Signed) “*Richard Clegg*.

“*Richard Shuttleworth*” (defendant), “agent for the said *Saville Stott*, the vendor.”

One of the conditions was, “That the purchaser shall, immediately upon the close of the sale, if required by the auctioneer or agent to the sale, pay a deposit of 10*l*. per cent., in part of the purchase money, together with the auction duty, and shall pay the remainder of the purchase money to the vendor on the 21st day of *November* next, at the hour of eleven in the forenoon, at the office of Messrs. *Shuttleworth, Holgate, and Roberts*, solicitors, *Rochdale*” (the defendants), “at which time and place, upon payment of the remainder of the purchase money, the purchase deeds shall be executed by all proper parties, and the purchase completed to the purchaser” &c. If the purchaser failed to comply with the conditions, the deposit money was to be forfeited to the

1840.

—
BAMFORD
against
SHUTTLE-
WORTH.

the vendor, who should be at liberty to compel a specific performance, or to resell &c. Plaintiff paid a deposit of 16*l.* to defendants, and they gave him the following receipt.

“ *Rochdale*, 19th *July* 1837.

“ Received from Mr. *Charles Bamford* the sum of 16*l.*, being the deposit money for purchase of certain cottages at *Laneside*, being the premises comprised in lot 3., parcel of the property advertised to be sold on the 5th instant, and belonging to Mr. *Saville Stott*.

(Signed) “ *Shuttleworth, Holgate, and Roberts*,
Agents for the said *Saville Stott*.”

These premises, with other property of *Stott*, were under mortgage to one *Woolfenden*; and he refused to join in the conveyance till his whole mortgage should be paid off, which not being done, the purchase could not be completed (a). On *Woolfenden*'s refusal, the
defendant

(a) As to this part of the transaction, it was proved that Mr. *Partington*, an attorney employed by the purchaser of another lot, sent the defendants a draft of conveyance, and received from them the following answer.

“ *Rochdale*, 16th *November* 1837.

“ Sir,— Since we received the draft conveyance from Mr. *Woolfenden* and others to Mr. *John Brierley*” (the last-mentioned purchaser), “ sent to us for perusal on behalf of Mr. *S. Stott*, we have sent for Mr. *Stott*; but he has not yet called upon us; and we do not feel ourselves authorized to approve of the draft conveyance until we have seen him.

“ We return your draft; and when we receive Mr. *Stott*'s instructions we can send for it again. All the property in mortgage to Mr. *Woolfenden* is not sold, unless a portion of it has been disposed of since the sale by auction; and this we cannot ascertain without seeing or hearing from Mr. *Stott*. Unless it all be sold he will not be able to pay off the mortgage debt: and we are not aware that Mr. *Woolfenden* will take his money by instalments and assign over the property at different times. We are” &c.

“ *Shuttleworth, Holgate, and Roberts*.”

This

defendant *Shuttleworth* had offered, if he would execute the necessary conveyances, to pay, or give him security for, the residue of his mortgage money. It further appeared that the defendants had, under *Stott's* direction, applied the deposit money in paying the expenses of sale, interest on the mortgage, &c. The defendants' counsel insisted that, on this case, the plaintiff could not recover, because the deposit was paid to the defendants as agents for *Stott*, the vendor, and not as stakeholders, and *Stott* might have brought an action for the amount against them as his agents. *Stephens v. Badcock* (a) and *Cox v. Prentice* (b) were cited. *Edwards v. Hodding* (c) and *Gray v. Gutteridge* (d) were relied upon on the other side. It was further objected, for the defendants, that the plaintiff had not proved tender of a conveyance, nor excused omitting it; but nothing ultimately turned on this point.

The learned judge refused to nonsuit on the objections; and, after the defendants' case had been gone through, he gave his opinion to the jury that the plaintiff was entitled to recover; but he reserved leave to enter a nonsuit, if the Court should be of a different opinion. As to the paying over of the deposit money by *Stott's* direction, his lordship thought that fact not material, if the defendants ought, as stakeholders, to have retained it. Verdict for plaintiff.

1840.

—
BAMFORD
against
SHUTTLE-
WORTH.

This evidence was given to shew that the plaintiff was excused from tendering a conveyance, and that the defendants, from the date of that letter at least, knew that the purchase could not be completed. For the defendants, it was insisted that no conclusion could be drawn from this letter in favour of the plaintiff, as the person to whom it was addressed was not proved to have been plaintiff's attorney at the time when it was written; though he appeared to have been so afterwards.

(a) 3 B. & Ad. 354.

(b) 3 M. & S. 344.

(c) 5 Taunt. 815.

(d) 3 Car. & P. 40.

Cresswell,

1840.

—
BAMFORD
against
SHUTTLE-
WORTH.

Cresswell, in the ensuing *Michaelmas* term (a), moved for a rule to shew cause why a nonsuit should not be entered. *Edwards v. Hodding* (b) is distinguishable: there the defendant was not only solicitor but auctioneer, and, in that character, agent for both parties, and capable of binding both. Here nothing shews that the defendants were agents for the purchaser. In *Gray v. Gutteridge* (c) the defendant was an auctioneer; and Lord *Tenterden*, in his ruling, relied on that circumstance, saying, "In this case, the defendant, as auctioneer, signs the written contract, and the money is paid to him, his principal being present; and he does not pay it over to his principal till after the party is gone. He signs the contract in his own name, and receives the money himself; and it is the constant practice of persons making purchases at auctions to pay their deposit-money, trusting to the solvency of the auctioneer." Here the privity is between the plaintiff and *Stott*, and not between the plaintiff and *Shuttleworth*, who was merely the vendor's agent, and signed the contract and receipt expressly in that capacity. The case resembles *Stephens v. Badcock* (d). [*Patteson J.* referred to *Edden v. Read* (e).] Any facts which might shew that the defendants improperly paid over the deposit to *Stott* are immaterial, if the defendants were not stakeholders, and the privity, from the first, was between the plaintiff and *Stott*. They could not make themselves liable as stakeholders if they were not such originally.

Supposing that the defendants here stand (as to agency) in the same situation as the agent in *Cox v. Prentice* (g),

(a) November 3d, 1838. Before Lord Denman C. J., *Patteson, Wilkams, and Coleridge* Js.

(b) 5 Taunt. 815.

(d) 3 B. & Ad. 354.

(g) 3 M. & S. 344.

(c) 3 Car. & P. 40.

(e) 3 Campb. 338.

the evidence sufficiently shews that they have paid over the deposit to their principal, and that case is an authority in their favour. [*Patteson* J. That would be ground for a new trial.]

1840.

BAMFORD
against
SHUTTLE-
WORTH.

The Court (after time taken for consideration) granted a rule nisi (a).

Alexander now shewed cause. The defendants were properly sued as the stakeholders, who, if the sale was completed, should have paid the deposit money to the vendor; or, if not, should have returned it to the purchaser. The condition of sale was, that the purchaser should, if required by the auctioneer, or agent to the sale, pay a deposit. The defendants received this deposit in the character of such agents. The case is the same in principle with *Burrough v. Skinner* (b), where a contract of sale was broken off, on reasonable objection by the purchaser, and the auctioneer, who had, or ought to have had, the deposit still in his hands, was held liable for the amount, as a stakeholder. *Edwards v. Hodding* (c) comes near to the present case; there the auctioneer, who was solicitor also, had paid over the money to his principal, but was nevertheless held liable. *Gray v. Gutteridge* (d) is a case of the same class. There the defendant was auctioneer only; but the liability in such cases cannot depend on that particular character; any agent to the sale, who represents the vendor, must stand in the same situation. In *Harrington v. Hoggart* (e), where an auctioneer was held not

(a) November 9th, 1838.

(b) 5 Burr. 2639.

(c) 5 Taunt. 815.

(d) 3 Car. & P. 40.

(e) 1 B. & Ad. 577.

liable

1840.

BAMFORD
against
SHUTTLE-
WORTH.

liable to the vendor for interest which accrued on a deposit pending the sale, Lord *Tenterden*, after referring to *Rogers v. Boehm* (a), draws the distinction clearly between a mere agent and a stakeholder. "If an agent receive money for his principal, the very instant he receives it, it becomes the money of his principal. If, instead of paying it over to his principal, he thinks fit to retain it, and makes a profit of it, he may, under such circumstances, as occurred in that case, be liable to account for the profit. Here the defendant is not a mere agent, but a stakeholder. A stakeholder does not receive the money for either party, he receives it for both; and until the event is known, it is his duty to keep it in his own hands. If he think fit to employ it and make interest of it, by laying it out in the funds or otherwise, and any loss accrue, he must be answerable for that loss." "The defendant here has not laid out or made a profit of the plaintiff's money, for at the time he laid it out it was not the plaintiff's, and it was doubtful whether it would ever become so or not." *Cox v. Prentice* (b), and other cases of that class, shew that an agent, while he stands in an intermediate situation between his principal and another party, and has not done what amounts to a payment over of that which is claimed by one from the other, is himself liable as a principal. In any cases which may be relied upon for the defendants, it will be found that the party exonerated was an agent on one side only. It was not clear, in this case, that *Shuttleworth* paid over all the money deposited with him on the sales; but, even if he had, that circumstance was immaterial, if the defendants were bound to retain the money till the title was made out.

(a) 2 *Exp.* 702.

(b) 3 *M. & S.* 344. See *M'Carthy v. Colvin*, 9 *A. & E.* 607.

That

That not being done on the appointed day, the plaintiff had then a right to recover back his deposit. The vendor's inability to make a title had this effect, independently of any thing which may have passed excusing tender of a conveyance (a).

1840.

—
BAMFORD
against
SHUTTLE-
WORTH.

Cresswell (with whom was *Cowling*), *contra*, was stopped by the Court.

LORD DENMAN C. J. There is no doubt in this case. The defendants received the money as attorneys for *Stott*, and to account to him. There was no privity between them and the plaintiff. Several cases shew that, under circumstances like these, the action cannot be maintained.

LITLEDALE J. I am of the same opinion. The defendants, in the receipt signed by them, called themselves agents for the vendor.

PATTESON J. In all the cases cited by Mr. *Alexander*, the defendant was liable as auctioneer.

COLERIDGE J. The payment over was immaterial. The moment the money was in *Shuttleworth's* hands, it was virtually in *Stott's* hands.

Rule absolute.

(a) On this point he cited *Cornish v. Rowley*, 1 *Setv. N. P.* 178., 9th ed.; *Clarke v. King*, 2 *Car. & P.* 286.; *Lowndes v. Bray*, 1 *Sugd. Vend. & Purch.* 377. 10th ed.

1840.

Saturday,
May 9th.

HARTLEY *against* WHARTON.

Debt for goods sold and delivered : plea, infancy : replication, that defendant ratified the contract, in writing, signed by him, after coming of age. Issue thereon.

Plaintiff produced the following paper, signed by defendant. "I am sorry to give you so much trouble in calling ; but I am not prepared for you ; but will without neglect remit you in a short time."

The paper had no address or date, and specified no sum : but it was proved orally that defendant delivered it to plaintiff's agent, on being pressed for the debt, the amount of which was also proved by oral evidence. Held sufficient to satisfy stat. 9 G. 4. c. 14. s. 5.

No evidence

was given to shew whether defendant was of age or not when he delivered the paper : Held, that plaintiff must recover, defendant, if he relied on his infancy at the time, being bound to prove it.

DEBT for goods sold and delivered, and on an account stated.

Plea, as to 1*l.* 4*s.* 8*d.*, parcel &c., that defendant, at the time of making the supposed contract, was an infant, and, as to the residue, nunquam indebitatus. Replication, as to 1*l.* 4*s.* 8*d.*, so far as defendant is supposed to have been indebted to plaintiff in the said sum for goods sold and delivered, that defendant, after making the contract, and before the commencement of the action, towit on 9th *January* 1832, attained his age of twenty one years ; and afterwards, towit on 23d *April* 1833, towit by a writing then signed by defendant, ratified, confirmed, and assented to the said contract : verification. And, as to the 1*l.* 4*s.* 8*d.*, so far as defendant is supposed to have been indebted otherwise than for goods sold and delivered, that defendant, at the time of making the said supposed contract, was of the full age of twenty one years &c. ; conclusion to the country. As to the residue, similiter. Rejoinder, traversing the ratification, as to the goods sold and delivered, modo et formâ, and joining issue as to the remainder of the contract. Similiter on the traverse.

On the trial before *Williams J.*, at the *Liverpool* summer assizes, 1838, the plaintiff proved the delivery and value of the goods, and called a witness, who proved that, in 1833, he was sent by plaintiff to defendant, and

presented

presented the account, and demanded the debt: that defendant desired witness to call again the same day, which witness did, and then received from defendant's servant a paper, in defendant's handwriting, which was as follows.

1840.

HARTLEY
against
WHARTON.

" Sir, — I am sorry to give you so much trouble in calling, but I am not prepared for you; but will without neglect remit you in a short time. — Yours respectfully,

" *Monday night, 6 o'clock. Frederick Wharton.*"

There was no address. The defendant's counsel objected that this note was insufficient to satisfy stat. 9 G. 4. c. 14. s. 5., as it contained no date, and did not specify the debt, or the creditor's name; and, further, that the plaintiff was bound to shew that the acknowledgment was made after the defendant attained his majority. The learned Judge directed a verdict for plaintiff for 11*l.*, being the value of the goods sold and delivered, deducting a payment for which credit was given; and reserved leave to move for a nonsuit. In *Michaelmas* term, 1838, *Alexander* obtained a rule accordingly.

Hoggins now shewed cause. First, the note is a sufficient "promise or ratification" "made by some writing signed by the party to be charged therewith," within stat. 9 G. 4. c. 14. s. 5. The statute does not require that the sum or the debtor should be specified, or a date given. The writing need contain no more than what an oral acknowledgment must have contained before the statute: this was ruled in *Haydon v. Williams (a)* as to

(a) 7 Bing. 163.

1840.

HARTLEY
against
WHEATON.

an acknowledgment of a new contract to bar the statute of limitations, under sect. 1 of the act, where the words are the same as in sect. 5. In *Lechmere v. Fletcher* (a) it was held that under sect. 1 the writing need not state the amount, but that oral evidence might be given to shew it; and the Court remarked that, in *Dickinson v. Hatfield* (b), the case of *Kennett v. Milbank* (c) (which will be relied upon in support of the rule here) was pressed upon Lord Tenterden, who nevertheless held that a promise in writing to pay "the balance" satisfied the statute. In *Dickinson v. Hatfield* (b), there being no proof at all of the amount, the plaintiff had only nominal damages: here there is distinct proof of the value of the goods. *Lechmere v. Fletcher* (a) is confirmed by *Bird v. Gammon* (d). Secondly, the plaintiff having proved an acknowledgment satisfying the statute, it was for the defendant to meet that, if he could, by shewing that the party making it was under age. If the jury find the fact, the new promise is supported by the original consideration: *Southerton v. Whillock* (e), *Hawkes v. Saunders* (g): and then the burthen is thrown on the defendant to shew any fact which answers the proof of such a promise. It is as if issue had been directly joined on a plea of infancy. *Borthwick v. Carruthers* (h) is in point.

Alexander, contra. *Kennett v. Milbank* (c) is an authority for the defendant on the first point. There *Alderson J.* said, "The acknowledgment here is only of

(a) 1 C. & M. 623. S. C. 3 Tyrwh. 450. See *Dodson v. Mackay*, note (b) 8 A. & E. 225.

(b) 1 M. & Rob. 141.

(c) 8 Bing. 38. S. C. 1 Moore & Scott, 102., where the deed is more fully stated.

(d) 3 New Ca. 883.

(e) 2 Str. 690.

(g) 1 Cowp. 289.

(h) 1 T. R. 648.

some

some debt; but of what, remains to be made out by parol evidence. To admit such evidence under these circumstances, would defeat the whole object of the recent statute. It might lead to conflicting testimony, and produce all the inconvenience which that statute was designed to obviate." The later cases, if they go the length of overruling *Kennett v. Milbank* (a), require reconsideration. But no case has shewn that the name of the creditor can be omitted. As to the second point, the plaintiff, by his replication, undertook to prove an acknowledgment made at full age.

1840.

HARTLEY
against
WHARTON.

LORD DENMAN C. J. This rule was granted on two points. As to the first, there was proof of the delivery of the goods; and the question is whether the replication, alleging a ratification by writing after the defendant was of age, has been proved. There is no date to the writing; but the act requires none, but only a promise or ratification made by some writing signed by the party to be charged therewith. Then it is urged that the party to whom the promise was made is not named. That I do not think necessary. If such a promise were in a letter, the address would be evidence; and, if that were in an envelope, evidence might be given to connect the two: and so evidence may be given shewing for or to whom the written acknowledgment was made, by delivery or otherwise. Then it is said that no sum is named. I do not say that it might not have been desirable that the statute should have required this; but it does not do so in fact. And the decisions of the Courts of Common Pleas and Exchequer, and of Lord

(a) 8 Bing. 38.

1840.

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HARTLEY
against
WEANTON.

Tenterden at Nisi Prius, shew that this is not necessary; though an earlier decision of the Common Pleas points the other way. If we were to give way to the objection, we should be making a new enactment. The debtor seldom specifies the amount. The effective words in the act are "promise" and "ratification." The mischief to be provided against was, not the want of particularity as to the sum, but looseness of proof as to the fact of acknowledgment. As to the second point, *Borthwick v. Carruthers* (a) is conclusive; and that case was acted upon at Nisi Prius by Mr. Justice Holroyd (b). In *Borthwick v. Carruthers* (a) Grose J. points out that "it is to be presumed that, when a man contracts, he is of proper age to contract, until the contrary be shewn." And Buller J. puts the question on a very satisfactory ground; that the defence, after the contract has been proved, "arises from a personal incapacity to contract, which lies only within the defendant's knowledge, and which therefore he ought to prove." Thus the weight of authority is with the plaintiff; and the case has often been quoted. No objection therefore can be supported upon the form of the issue.

LITLEDALE J. The first question is on the form of the instrument. It might be more satisfactory if the statute required the name of the creditor to be in writing: that, however, it does not do. An address is often on an envelope, which may not be preserved, so that oral evidence must be given. On the whole, I think it is not necessary that the creditor should be named in

(a) 1 T. R. 648.

(b) *Bates v. Wells*, Lancaster Spring Assizes, 1822, 1 Stark. Ev. 363. note (g) (2nd ed.).

the writing ; but that this step may be supplied by other evidence. Then, as to naming the amount of the debt ; *Kennett v. Milbank* (a) is cited as an authority to shew that this is necessary ; but I think there is no such necessity : if there were, the act would hardly ever be complied with, for the sum is very rarely named ; and in the two later cases it was held not to be necessary. Then on whom is the onus probandi as to the age of the party at the time of ratification ? Had the replication to the plea of infancy been simply a denial, the burthen of proof would have lain on the defendant : and it is so here ; for how could the plaintiff obtain proof ? Is he to search the registers ? He does not know where the defendant is born, nor even whether he was born in *England*. Therefore, both on reason and on the authority of *Borthwick v. Carruthers* (b), which has been confirmed by *Holroyd J.*, I think the proof, as to this, lay on the defendant.

1840.

HARTLEY
against
WHARTON.

PATTESON J. As to the first point, stat. 9 G. 4. c. 14. provides that the promise or ratification, made after full age of the party, shall be in writing, signed by him. Now here the writing is so signed ; and, no doubt, if it refers to the debt on the record, the statute is so far satisfied. The question is, can it be so applied ? There is no address on the note ; but it was delivered to the plaintiff's agent for him by the defendant. On this point there is no decided case : but, if oral evidence may supply the sum and the date, it surely may supply the delivery. Now, as to the sum, we have express authority : although *Kennett v. Milbank* (a) was not expressly overruled in *Bird v. Gammon* (c), yet the effect

(a) 8 Bing. 38.

(b) 1 T. R. 648.

(c) 3 New Ca. 883.

1840.

HARTLEY
against
WHARTON.

of the latter case clearly is that the sum need not be named in the writing, but may be proved aliunde. *Edmunds v. Downes* (a) establishes the same rule as to the date. Then, as to the burthen of proof, *Borthwick v. Carruthers* (b), a case acted upon by *Holroyd J.*, shews that it lay on the defendant. In fact, the question is still, infancy or not. Suppose issue had been taken, in the first instance, on the plea of infancy: no doubt the defendant must have proved it. The form of the replication is insisted upon; but it seems to have been considered that such a replication contained a negative assertion, that the defendant was not a minor at the time of the ratification; then the rejoinder, taking issue on that, asserts the affirmative, and this on a point within the knowledge of the defendant. I adhere to the decision in *Borthwick v. Carruthers* (b), whether I myself should, independently of authority, have so decided or not.

COLERIDGE J. There cannot be much doubt as to the second point; *Borthwick v. Carruthers* (b) is conclusive upon it, and that case has been often cited. On the other point, I yield to the authorities with great reluctance. After the decision of *Kennett v. Milbank* (c) Lord Tenterden, in *Dickinson v. Hatfield* (d), would not act upon it, but decided the other way, apparently on the ground that, before the statute, oral acknowledgments were received which did not specify the amount. That case seems to me to be one of a class by which a statute has been frittered away, in order to comply with the ordinary habits of men. It is common to send letters in envelopes; the statute is,

(a) 2 C. & M. 459. 463. But compare *S. C.* 4 Tyrwh. 173. 179.

(b) 1 T. R. 648.

(c) 8 Bing. 38.

(d) 1 M. & Rob. 141.

therefore,

therefore, construed so as not to interfere with this custom. Here we have a ratification expressing neither date, nor the name of the party to whom it is made, nor the debt for which it is made. But, it is said, there being express decisions that the name and amount need not be specified, we now may as well go on and dispense with the date. It is with very great regret that I find myself bound to decide so, in conformity with the authorities.

1840.

HARTLEY
against
WHARTON.

Rule discharged.

LAWRENCE *against* WILCOCK.

Monday,
May 11th.

ASSUMPSIT. The first count stated that, whereas theretofore, towit on 1st *April* 1831, defendant was tenant to plaintiff of a farm, lands, and premises, situate &c., and, in consideration thereof, defendant then promised plaintiff to eat, spend, use, employ, and consume upon the said farm, &c., all the hay which should grow and arise thereon during the said tenancy, and defendant continued tenant to plaintiff of the said farm, &c., for a long space of time, towit from the time of making the said promise until 12th *May* 1837, yet defendant, disregarding &c., after the making of the promise, and during the continuance of the tenancy, towit on the day and year first aforesaid, and on divers other days and times between that day and the said 12th *May* 1837, took and carried away,

Declaration in assumpsit stated that, in consideration that defendant was tenant of a farm to plaintiff, he promised to spend on the farm all the hay which should arise during the tenancy: breach, that a certain quantity of hay arose, but defendant spent it elsewhere. Pleas, 1. Non assumpsit: 2. that the hay was not spent elsewhere. The writ of summons was indorsed for 8*l.* 8*s.* 4*d.* debt. Held, not to

be triable before the sheriff, under stat. 3 & 4 *W.* 4. c. 42. s. 17.

And, a verdict having been recovered before the sheriff for 3*l.* 14*s.* 2*d.*, the Court set aside the writ of trial and subsequent proceedings; though it was suggested that defendant had assented to the trial being had before the sheriff, and the Court, for that reason, gave no costs.

off

1840.

—
LAWRENCE
against
WILCOCK.

off and from the said farm, &c., divers large quantities, towit 1000 yards, of hay, of great value, towit &c., which had arisen and grown upon the said farm, &c., during the continuance of the said tenancy; and sold the same, and used, spent, and consumed the same elsewhere than on the said farm, &c., or any part thereof; contrary to the said promise &c. The second count stated that, whereas defendant was tenant to plaintiff of a farm, &c., on the following (amongst other) conditions, that is to say, that defendant should eat &c. (as before), in consideration thereof, and that plaintiff would dispense with that condition, and permit defendant to remove and sell the hay, and carry away, use, and consume the same elsewhere, defendant promised to pay plaintiff 10*d.* a yard for every yard of hay which defendant should so sell, &c.: averment, that plaintiff did dispense &c., and gave permission &c.: that defendant did sell, &c., a great part, towit 500 yards, of the said hay, and dispose of &c., elsewhere: breach, that defendant had not paid the 10*d.* a yard &c., and there was due to plaintiff, on account of the hay so sold, a large &c., towit 18*l.* 15*s.*, which defendant had not paid. Damages 100*l.*

Pleas: 1. Non assumpsit. 2. To first count, that defendant did not take and carry away &c. 3. To second count, a like denial of the sale. Issues on all the pleas.

On the trial, on 23*d* *March* 1820, before the assessor to the sheriff of *Lancashire*, the plaintiff had a verdict for 3*l.* 14*s.* 2*d.*

Cowling, in this term, obtained a rule to shew cause why the writ of trial and subsequent proceedings should not be set aside, with costs, on the ground that, the first
count

count of the declaration being for unliquidated damages, the sheriff had not power to try the issue. The rule was obtained on affidavit verifying the record and the assessor's notes. By the latter, it appeared that the evidence for the plaintiff, as to the amount of damages, had consisted of estimation by witnesses as to the damage to the farm per yard of hay carried off, and as to the payment per yard of hay ordinarily made when the hay was carried off; and that the defendant, to reduce the damages, had given evidence of the quantity of manure laid on the farm by him.

By the affidavits in opposition, it appeared that the writ of summons was indorsed for 8*l.* 8*s.* 4*d.* for debt: that a summons was taken out by the plaintiff to shew cause why a writ of trial should not go to the sheriff: that the hearing was postponed at the request of the defendant's *London* agent, who wished for time to communicate with defendant's attorney in the country: that the summons was afterwards attended by the agents on both sides, and no objection being offered by defendant's agent, the order was made on 5th *March* 1840: that notice of trial was given for *March* 20th: that a paper, dated 18th *March* 1840, was signed by the attorneys on both sides, containing the following words. "We the undersigned, being the attorneys for the plaintiff and defendant, do hereby consent and agree that the cause shall be tried on *Monday* the 23d, or, if more convenient to the sheriff, on *Tuesday* the 24th of *March* instant, instead of *Friday* the 20th of *March* instant, the day for which notice of trial is given." That the plaintiff's attorney was anxious to have the issue tried at the assizes and not before the sheriff; and that, if defendant's agent had consented, or had intimated

1840.

 LAWRENCE
 against
 WILCOCK.

1840.

—
LAWRENCE
against
WILCOCK.

mated a wish for the issue to be tried at *Nisi Prius*, the plaintiff's agent would have consented thereto, not only before but even after the notice for trial before the sheriff.

T. F. Ellis now shewed cause. The more regular course would be for a party, who objects to a trial taking place before the sheriff, to move to rescind the judge's order, instead of taking the chance of a verdict, and then objecting to the jurisdiction. But it must be admitted that the present course has been sanctioned by the courts. Here, however, the defendant has waived the objection by his consent: first, impliedly at the time of the order being made; and, afterwards, expressly by the writing of 18th *March*. It is true that consent cannot create jurisdiction: but an objection to the jurisdiction may be waived by consent. Thus, no consent could give effect to a judgment of the Common Pleas on a crown case, or to a judgment of the Queen's Bench on a writ of right; for there the record would be inoperative at any step. Whereas, on the other hand, a plea to the jurisdiction cannot be pleaded after a plea in abatement or bar; and this because the plea in abatement or bar is a waiver of the objection. Here the record will be operative if the *postea* be entered for the plaintiff, according to the finding. The consent therefore waives the objection. This was clearly the opinion of the Court in *Price v. Morgan* (a), though the judgment turned on another point. In a case of tort, where, from the form of action, the facts never could be such as to give jurisdiction, this reasoning would perhaps fail, as in *Smith v. Brown* (b).

(a) 2 M. & W. 53.

(b) 2 M. & W. 851.

But

But where the action is shaped in *assumpsit* the sum sought may be a debt or demand.

But, further, the first count contains a "demand" within stat. 3 & 4 *W. 4. c. 42. s. 17*. It would certainly be a sufficient objection to the jurisdiction if either count, taken alone, were objectionable. But here the demand in the first count is substantially for the value of the manure which the farm would obtain from the consumption of a certain quantity of hay. That is matter of computation; and, in fact, the notes of the trial shew that the damages were treated as matter of computation both by plaintiff and by defendant: they were reduced by proof of the manure actually laid on. The evidence might vary as to the amount of hay actually taken off, as to the number of horses, &c., which so much hay would feed, or as to the value of the manure of so many horses. The damages, however, do not become unliquidated by an uncertainty as to the amount of particular items, but only by the absence of a definite principle of estimating the damages after the items are ascertained. Thus in *Broggref v. Hawke* (a) *assumpsit* was brought on a builder's contract; and Non *assumpsit*, part payment, and a set-off, were pleaded: all the items, as to amount, were there uncertain: but the lower taxation of costs, under the *Directions to taxing officers*, of *Hil. Vac. 4 W. 4. (b)*, would have been applied, except for the judge's certificate (c). It is not necessary that the damages should be such as the Court, on mere inspection of the record, and without the aid of a jury, can estimate; that rule would exclude actions for goods sold and delivered, or on bills of exchange carrying in-

1840.

LAWRENCE
against
WILCOCK.

(a) 3 *New Ca.* 880.

(b) 5 *B. & Ad.* xix.

(c) See *Broggref v. Hawke*, 5 *Scott*, 148. *S. C.* 6 *Dowl. P. C.* 67.

terest.

1840.

LAWRENCE
against
WILCOCK.

terest. In *Price v. Morgan* (a) assumpsit was brought upon an undertaking by the defendant that he was authorised by *W.* to purchase a pony on *W.*'s behalf; the breach being, that the defendant had not such authority. It was held that this was a case which the sheriff could try, *Parke B.* saying, "this was an action in substance for the price of the pony, and therefore within the act." In *Allen v. Pink* (b) assumpsit was brought on a warranty that a horse was "a quiet worker, and would go well in spare harness." This was held to be a case triable by the sheriff. Lord *Abinger* said, "The word 'demand' must be construed to mean a claim ejusdem generis with debt; and when the claim is under 20*l.*, and is in the nature of a demand for which assumpsit will lie, it may be reasonably considered as falling within the terms of the statute." "This is an action for the breach of a warranty to go quiet in harness, which would be limited by the price of the horse and the price of his keep, if any; and the whole demand is under 20*l.*" And *Alderson B.* said, "This is in substance an action for the price of the horse, to be recovered by proof of the breach of warranty; the plaintiff cannot recover more than that amount, which is clearly within the limit of the statute." Here the limit is the value of the manure to be produced; it is like an action for failing to deliver goods purchased, which would clearly be within the act, because the principle of computation is definite after the items are determined (c). It can make no difference that the manure was to be produced by the consumption of the hay; a contract to deliver articles yet

(a) 2 *M. & W.* 53.(b) 4 *M. & W.* 140.(c) See *Green v. Bicknell*, 8 *A. & E.* 701.

unmanufactured would be within the act. Neither can it make any difference that the damages are laid at 100*l*. The damages laid in *Broggref v. Hawke* (a) were larger. It is true that the plaintiff, by inserting on the record, or in the particulars of demand, an express claim for unliquidated damages, might bring the case without the statute. Thus in *Jacquet v. Bower* (b) *assumpsit* was brought for wrongfully discharging the plaintiff and his wife from the defendant's service; and the particulars claimed the arrears of wages, "and also such damages as the jury may think proper to give, by reason of the plaintiff and his wife having been discharged by the defendant without notice." The Court set aside the writ of trial and subsequent proceedings. The counsel in support of the rule admitted that, but for the last clause in the particulars, the objection would not have lain. And *Parke* B., in delivering the judgment of the Court, said, "It is true, that on one point there was a limit in this case, viz., so far as regards the amount of the sum sought to be recovered in the shape of wages for by-gone service, which served to explain the nature of the plaintiff's demand so far; but it by no means followed that the sum would be the full amount of damages which the jury would give. That depended entirely on the peculiar circumstances of the case; in other words, the damages were unliquidated damages, and, consequently, not within the statute." That case, therefore, is decided on grounds not existing in the present, and incidentally recognises the rule for which the plaintiff contends. The safest criterion appears to be, whether the nature of the claim be so

1840.

 LAWRENCE
against
WILCOCK.
(a) 3 *New Ca.* 880. *S. C.* 5 *Scott*, 148., 6 *Dowl. P. C.* 67.(b) 7 *Dowl. P. C.* 331. *S. C.* 5 *M. & W.* 155.

limited

1840.

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LAWRENCE
against
WILCOCK.

limited that the Court, after verdict, and having the evidence before them, could take upon themselves to reduce them, or direct a new trial, if the damages exceeded the limit.

Cowling contra. The reason of its not being necessary to rescind a Judge's order is that frequently, as was the case here, there is no term intervening between the order and the trial. Further, the facts here do not shew a consent: the memorandum of 18th *March* was merely a consent to alter the day of trial, not a waiver of objection to the proceeding. But no consent could waive the objection. In *Jervis' New Rules*, p. 429. note (a), (ed. 4.), it is said, "It appears at one time to have been considered, that by consenting to the order, and appearing at the trial, the defendant waived any objection to the jurisdiction of the sheriff; (see *Price v. Morgan*, 2 *M. & W.* 55.); but it seems now to be agreed, that the parties cannot, by their consent, give him jurisdiction in a case not triable by him under the statute. (See *Smith v. Brown*, 2 *M. & W.* 851.: *Allen v. Pink*, 4 *M. & W.* 140.)." It is attempted to distinguish this case from *Smith v. Brown* (a) and other cases of tort, on the ground that the objection there is on the record; but it is not less so in assumpsit for unliquidated damages. [*Patterson J. Edge v. Shaw* (b) was in assumpsit; and there it was argued that the plaintiff, who objected to the trial before the sheriff, had obtained the writ of trial; but the Court appears not to have allowed any weight to the argument.] Then, as to the nature of the action. [He was then stopped by the Court.]

(a) 2 *M. & W.* 851.

(b) 2 *C. M. & R.* 415. *S. C.* 5 *Tyrrah.* 1127.

Lord DENMAN C. J. The cases cited against the rule were all brought before my Brother *Parke* in *Jacquet v. Bower (a)*; and he, after considering them, determined that the sheriff could not try the cause. It is better to adhere to that decision than leave open continual questions whether particular cases fall within the statute.

1840.

LAWRENCE
against
WILCOCK.

T. F. Ellis then prayed that the rule might not be made absolute with costs, the defendant having been a party to the proceeding.

Per Curiam (b),

Rule absolute, without costs.

(a) 7 Dowl. P. C. 331. S. C. 5 M. & W. 155.

(b) Lord Denman C. J., *Littledale, Patteson, and Coleridge Js.*

The QUEEN *against* TAYLOR.

Tuesday,
May 12th.

L. *PEEL*, in this term, obtained a rule calling on *John Taylor* to shew cause why a quo warranto information should not issue, requiring him to shew by what authority he claimed to be coroner of the borough of *Bolton, Lancashire*. The grounds stated were — 1. That the charter of the borough was not granted on petition of the majority of the inhabitant householders. 2. That the charter, which purports to extend to the inhabitants the powers and provisions of stat. 5 & 6 W. 4. c. 76., is not granted or made pursuant to the act, and that the powers and provisions of the act are not capable of being exercised by the body claiming to be and acting as the town council. 3. That the charter provides for the division of the borough into

The Court will not grant a quo warranto information against an officer of a corporation established by charter pursuant to stat. 7 W. 4. & 1 Vict. c. 78. s. 49., if it appear that the object in prosecuting such information is to try the legality of the charter.

1840.

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The QUEEN
against
TAYLOR.

wards, assigning councillors, making a burgess list, &c., and orders the same to be had and made otherwise than as the act directs. 4. That no burgess roll is directed by the charter to be made; and that none was made pursuant to the act before the first election of councillors, or before the supposed appointment of *Taylor* to be coroner. 5, 6. Variations of the charter from stat. 5 & 6 W. 4. c. 76., as to the constitution of the electoral body, and as to the time of the first elections of councillors, aldermen, and mayor. 7. That there was not, at the time of *Taylor's* appointment, any legal grant to the borough of a court of quarter sessions, nor any such court legally constituted, inasmuch as there was not then, or before or since, any gaol in or for or belonging to the borough (a).

The application was made by *William Smalley Rutter*, described in his affidavits as "of *Broughton*, in the county of *Lancaster*, gentleman," one of Her Majesty's coroners in, of, and for the county palatine. He stated that there were six coroners for the county, each, by custom, acting exclusively within a particular district, and receiving the fees &c. which accrued there; and that, until the granting of the charter after mentioned, he so acted for that part of the county now comprised within the borough of *Bolton*. That her Majesty, by a charter of incorporation, on or about 11th October 1838, under letters patent (a copy of which charter was annexed to the affidavit), granted to the inhabitants within the borough of *Bolton* to be incorporated by the name of the mayor, aldermen, and burgesses of the borough of *Bolton*; which charter purported to be made and granted under

(a) See *Regina v. The Justices of Lancashire*, ante, p. 144.

stat. 7 W. 4. & 1 Vict. c. 78. s. 49., and to extend to the said inhabitants all the powers and provisions of stat. 5 & 6 W. 4. c. 76. That her Majesty afterwards granted to the inhabitants of the said borough to have a separate court of quarter sessions. And that, afterwards, the council of the borough appointed *John Taylor* coroner of the said borough, who had since acted, and who now claimed to exclude deponent, as one of the county coroners, from acting as such coroner within the borough. The affidavit also contained statements in support of the objections set forth in the rule.

1840.

The QUEEN
against
TAYLOR.

Crompton now shewed cause. First, taking this as an ordinary application against a corporate officer, *Rutter* is not a good relator. It does not appear that he has any thing to do with the borough, or is even an inhabitant. A mere stranger to the corporation cannot impeach the title of a corporator by a quo warranto: this appears from *Rex v. Trevenen* (a) and *Rex v. Hodge* (b), and was decided, even where the relator was an inhabitant, in *Rex v. St. John* (c). But, secondly, the intended effect of this application is to shake the title of the whole corporation; and an information for that purpose cannot be brought by a private individual; *Rex v. Ogden* (d). The same case shews that quo warranto does not lie "for usurping a franchise of a mere private nature, not connected with public government." The office in respect of which the relator ostensibly makes this application is not connected with public government. Further, the objections stated in the rule are insufficient

(a) 2 B. & Ald. 339, 479. ¶

(b) Note (a) to *Rex v. Trevenen*, 2 B. & Ald. 344.

(c) 2 Selw. N. P. 1172. 9th ed.

(d) 10 B. & C. 230.

1840. in themselves; and the affidavit is too loose to sustain them. (It is unnecessary to state the arguments on this part of the case.)

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The QUEEN
against
TAYLOR.

Cresswell and *L. Peel*, contra. As to *Rex v. Ogden* (a); even if an office be of a public nature, the interest which every individual has in it is personal: but there the right itself, in respect of which the application was made, was a private franchise; therefore the information was refused. The real question is, what is the nature of the office or franchise which it is proposed to contest? Here the office, to which belongs the administration of justice in a court of record, is clearly public, though the relator has also an interest peculiar to himself in the functions which have been transferred from him to another. *Rex v. Brown* (b) shews that a party, without being a member of a corporation, may have interest enough in a public question concerning it to qualify him for being a relator. A quo warranto lies for the office of coroner, *Com. Dig. Quo Warranto*, (A.): and a quo warranto information against the officer usurping is the proper remedy here. It would be difficult to say that an information could be brought against the corporation for claiming to appoint. What judgment could be obtained on such a proceeding? At least an information for exercising the office is a more satisfactory course than an action; for the judgment is in rem, and conclusive on all persons. In *Tancred on Quo Warranto*, chap. 2., p. 20, &c., many instances are given in which quo warranto against the officer has been deemed the proper remedy for unduly holding courts of less importance than that of the coroner.

(a) 10 B. & C. 230. (b) Note (b) to *Rex v. Smith*, 3 T. R. 574.

As to the argument that this proceeding impeaches the general title of the corporation, stat. 4 & 5 *W.* 3. c. 18. and stat. 9 *Ann.* c. 20. have not limited the number of cases in which quo warranto informations may be moved for; and, although a restriction was established in *Rex v. The Corporation of Carmarthen* (a), where this Court refused to grant a quo warranto information, at the instance of a private person, against a whole corporation, yet even there rules were granted against the individual members, in respect of their several franchises; though the several informations, if successful, would have tended, no less than a collective one, to dissolve the corporation. And in *Rex v. White* (b) the chance of this result was held no objection to the granting of an information against an individual officer. The Court has granted a quo warranto information, under circumstances like the present, in the case of the *Coroner of Birmingham* (c). It is urged here that *Rutter* is incompetent to be a relator, because he does not appear to be resident in the borough: but that is immaterial where the question is not one affecting the local government; it is sufficient (as may be inferred from the manner in which the Court has before stated the law on this subject (d)) if the person claiming to be relator is in some respect subject to the jurisdiction of the council: and since stat. 5 & 6 *W.* 4. c. 76. corporations have more jurisdiction over strangers than they formerly had.

1840.

The QUEEN
against
TAYLOR.

(a) 2 *Burr.* 869.

(b) 5 *A. & E.* 613. And see *Rex v. Parry*, 6 *A. & E.* 810.

(c) *Regina v. J. B. Davies*. Rule nisi, January 16th, absolute, January 31st, 1840. The grounds of motion nearly resembled those in the present case; but the objection here insisted upon by the Court was not taken.

(d) See *Rex v. Hodge*, 2 *B. & Ald.* 344. note (a); *Rex v. Parry*, 6 *A. & E.* 810. Also *Regina v. Quayle*, ante, 508.

1840.

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The QUEEN
against
TAYLOR.

LORD DENMAN C. J. This is the case of a public officer in possession: and it has been argued that, for this reason, he is bound to shew himself well entitled, in order to retain the office. But I think it is also a reason that the title should not be lightly questioned. To attack a charter granted by the Crown through an officer appointed under it is a new proceeding; and I think we ought not to call upon the officer to defend the act of the Crown in granting the charter. There are other ways in which the objects of this application may be pursued. We cannot encourage such a novelty.

LITLEDALE J. I am of the same opinion. The object clearly is to call in question the charter; and it ought not to be done in this way.

PATTESON J. This is not like the case in which a corporation is acknowledged to exist, and the motion is made to call in question the right to an office within it. Here we are asked to allow an information in the name of the Crown, to set aside a charter which the Crown has granted. The course is so novel that we cannot encourage it (a).

Rule discharged (b).

(a) Coleridge J. was absent.

(b) See *Rutter v. Chapman*, 8 M. & W. 1.

1840.

The QUEEN *against* PAYN.Wednesday,
May 13th.

THE Court having, in this case, refused to quash the return to a mandamus on motion (*Rex v. Payn*, 6 A. & E. 402—7.), the prosecutors traversed the return. *Thesiger*, in last *Hilary* term, obtained a rule to shew cause why the traverse should not be taken off the file, on the ground that the legality of the return had already been questioned on the former argument.

Prosecutors of a mandamus moved to take return off the file, on affidavit, and on objections made against the validity of the return itself. The Court, after argument on the law and facts, ordered, in general terms, that the rule should be discharged. Defendant then traversed the return. On motion to take the traverse off the file, because judgment had already been given in favour of the validity of the return, Held, that discharging a rule under the above circumstances was not equivalent to a judgment on concilium, and that the prosecutors were

Sir J. Campbell, Attorney General, Sir W. W. Follett, and F. Robinson, now shewed cause. The Court in *Rex v. Payn* (a) decided only that they would not, under the circumstances, make a rule absolute for summarily taking the return off the file. Where a return is good, and nothing takes the case out of the ordinary course, the general rule has been that, if the validity of the return has been affirmed on argument, the facts alleged in it cannot be traversed; but that is after solemn decision on concilium. And, according to the opinion expressed by the Court to-day in *Regina v. The North Midland Railway Company* (b), even such a decision

will

entitled to traverse: the Court saying that they did not intend, on the motion, to decide upon the validity of the return in point of law.

(a) 6 A. & E. 392. 402.

(b) The QUEEN *against* The NORTH MIDLAND Railway Company.

Wednesday,
May 13th, 1840.

MANDAMUS to the company to cause a jury to be summoned for the purpose of assessing compensation under stat. 6 & 7 W. 4. c. cvii., local and personal, public. A return being made,

Where the return to a mandamus contains several distinct heads of

answer, the prosecutor may, by leave of the Court, traverse one or more of these, as untrue in fact, after having argued the validity of others in point of law on a concilium.

1840.

The QUEEN
against
PAYN.

will not prevent a traverse, on points independent of the question of law. Here, therefore, the prosecutors are in the same situation as if the former motion had not been made. The judgments delivered by this Court in *Rex v. The Mayor and Aldermen of London* (a) shew what was then considered the practice as to disputed returns. [Lord DENMAN C. J. We only said, in *Rex v. Payn* (b), that, whether the return were good or bad, we would not determine the point on that application. I had no idea of deciding then that the return was a good one. The defendant supposes that, by the argument, and ruling of the Court, on motion, the case is put into the same state as if there had been a judgment on concilium. Such a practice would be very inconvenient. Coleridge J. It is as if a question had been raised whether or not a plea was issuable, and, the Court refusing to say that it was

Whitehurst now moved that part of it might be quashed. The return consists of several distinct heads. Some of them furnish a good answer in point of fact, but insufficient in law; others allege matter available in law, but untrue in fact. If the prosecutor obtains a concilium, and the Court decides against him, the untrue facts cannot afterwards be traversed; *Rex v. The Mayor and Aldermen of London* (3 B. & Ad. 255. 275). He also cited *Rex v. The Mayor, &c. of Cambridge* (3 T. R. 456.), where part of the return was quashed, the prosecutor being left at liberty to traverse the rest. (But the officers on the Crown side of the Court pointed out that that took place on a concilium.)

Lord DENMAN C. J. Part of the return, if bad in law, may be quashed on concilium; and the prosecutor may afterwards have leave to traverse the other parts, if necessary.

LITTLEDALE, PATTERSON, and COLERIDGE Js. concurred.

Rule refused. Concilium granted.

No further proceeding took place, a compensation being agreed upon.

In *Regina v. The Manchester and Leeds Railway Company*, Hilary term, 1840, *Starkie*, before filing a traverse to defendants' return to a mandamus, applied for leave to take the opinion of the Court afterwards, on concilium, as to the other parts of the return, if it should be necessary. The Court assented, saying they thought the application quite reasonable.

(a) 3 B. & Ad. 255. 279.

(b) 6 A. & E. 392. 402.

not,

not, the defendant should treat this as a decision that the plea was good.]

1840.

The QUEEN
against
PAYN.

Talfourd Serjt., *Thesiger*, and *T. F. Ellis*, contra.

The prosecutors, on the motion, attempted to gain an advantage by bringing the question of law before the Court intermixed with the question of fact: they ought not, by such means, to place themselves in a better situation than if they had argued the case on concilium. The motion was equivalent to a concilium: if they had succeeded, a peremptory mandamus must have issued: having failed, they must not enjoy the benefit of a double course, by being allowed to traverse. In *Rex v. The Mayor and Aldermen of London* (a) judgment was given for the defendants on concilium: afterwards the prosecutor filed pleas traversing the return; and the Court ordered those pleas to be taken off the file. Lord *Tenterden* there puts the case of an issue in fact being taken on the return, and found for the defendant, and the prosecutor then wishing to question the validity of the return in point of law. "It is by no means clear," he says, "that the party might not by application to the court be permitted to question the sufficiency of the return in law. This would be analogous to the case where after verdict there is a motion in arrest of judgment, or to enter a judgment for the defendant *non obstante veredicto*. It is not necessary to decide how that would be, as it is not now before us. But a traverse," he adds (laying down the proposition generally), "if taken at all must be taken in the first instance." [*Coleridge* J. Do you say that, if the traverse were now taken off the file, the prosecutors could not have a concilium?] They could not: the question in law is no longer open. *Rex v. The St. Katherine Dock Company* (b) and

(a) 3 B. & Ad. 255.

(b) 4 B. & Ad. 360.

Rex

1840.
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 The QUEEN
 against
 PAYN.

Rex v. The Justices of Leicester (a) shew that a decision of the Court on motion to quash is equivalent to a judgment on concilium. The argument for the prosecutors in *Rex v. Payn* (b) was substantially the same as an argument on concilium; though they irregularly introduced affidavits, raising the questions of law and fact together. Many authorities were cited by the prosecutors to impugn the validity of the return; and it seems to have been upheld principally by reference to *Rex v. Round* (c).

Lord DENMAN C. J. We did not mean, in *Rex v. Payn* (b), to give any judgment on the validity of the return: and, for my own part, I should not be prepared to do so without much consideration, notwithstanding my respect for the decision in *Rex v. Round* (c). Here, the circumstance of affidavits having been used on the motion tends strongly to shew that the proceeding was not in the nature of a demurrer. The rule must be discharged. But, as a practice has prevailed, which has led us on many occasions to take returns off the file on motion (though the course was not always free from doubt), and as we do not mean to part with that jurisdiction in such cases any more than where frivolous pleas are pleaded, though we intend to exercise it very sparingly in future, we discharge the rule without costs.

LITLEDAL, PATTESON, and COLERIDGE Js. concurred.

Rule discharged without costs (d).

(a) 4 B. & C. 896. note (a). See *Rex v. The Justices of Staffordshire*, 6 A. & E. 84. 101.

(b) 6 A. & E. 392. 402.

(c) 4 A. & E. 139.

(d) See as to quashing returns on motion, *Regina v. St. Saviour's Southwark*, 7 A. & E. 925. 936.; *Regina v. The Governors of St. Andrew and St. George*, 10 A. & E. 736.

1840.

LATCH *against* WEDLAKE and LEWIS THOMAS.

ASSUMPSIT. The declaration stated that defendants and one *Rosser Thomas* were jointly possessed of the *Carn Gethin Collieries*, and were partners in working the same and disposing of the coal; and thereupon it was agreed between plaintiff and defendants that defendants and *Rosser Thomas* should sell and deliver coals to plaintiff (setting out a contract for sale and delivery of coals according to the agreement after stated): promise to perform: breach, non-delivery. Pleas, 1. Non assumpsit: 3. Denying the agreement in manner and form &c. Issues thereon. There were other pleas which it is unnecessary to notice.

On the trial, before *Gurney B.*, at the *Monmouthshire* Spring assizes, 1838, it appeared that, on *October 3d*, 1835, the defendants and *Rosser Thomas* being then partners in the *Carn Gethin Collieries*, the following agreement was signed by the plaintiff and defendants.

“Memorandum. That, on the 3d day of *October* in the year 1835, it was agreed between *Rosser Thomas*, *Thomas Wedlake*, and *Lewis Thomas*, of the one part, and *Joseph Latch* of the other part: the said *R. Thomas*, *T. Wedlake*, and *L. Thomas*, for themselves, their executors, administrators, and assigns, agree with the said *J. Latch*, his executors and administrators, to sell and deliver to him in tram waggons, to be found and provided for that purpose, and kept, maintained, and repaired, by the said *R. Thomas*, *T. Wedlake*, and *L.*

In assumpsit on a contract for the delivery of coals from a colliery, it appeared that the agreement (for supplying such coals, and for the demise of a coal wharf) purported to be made between plaintiff and the partners in the colliery, three in number, and was executed by plaintiff and two of the partners.

Held that, admitting such contract to be one by which partners might bind an absent co-partner or themselves, yet the Judge, on trial, ought not to decide, as matter of law, that the contract signed by two bound them, but should desire the jury to say whether it was intended to do so or not, if there are circumstances from which an intention can be inferred that no party should be bound unless all the partners signed.

As, the nature and terms of the agreement; the distance of time at which it was to come into operation; the declarations and conduct of the parties respecting it; and the manner in which previous contracts between them, of the same kind, had been executed.

Thomas,”

1840.

LATCH
against
WEDLAKE.

Thomas," "at or upon the wharf in the occupation of the said *J. Latch*, called *Commercial Wharf*, in the parish of" &c., "eighty tons per day (*Sundays* excepted) of marketable coal, to be raised and got from the collieries of the said *R. Thomas*, *T. Wedlake*, and *L. Thomas*, on the west side" &c. (describing the situation), "commonly called and known by the name of *Carn Gethin Collieries*, for the term of three years, commencing on and from the 1st day of *July* in the year 1837. And the said *J. Latch*, for himself, his executors, and administrators, promises and agrees to and with the said *R. Thomas*, *T. Wedlake*, and *L. Thomas*, to purchase from them the said eighty tons per day (*Sundays* excepted) of such marketable coal as aforesaid, for the term of three years commencing as aforesaid, and to pay the said *R. Thomas*, *T. Wedlake*, and *L. Thomas*, for the same, the price of 5s. 1d. per ton." "And the said *J. Latch*, for himself, his executors and administrators, hereby agrees to take and rent, and the said *R. Thomas*, *T. Wedlake*, and *L. Thomas* hereby agree to let, the said wharf, called *Commercial Wharf*, to the said *J. Latch*, for the said term of three years, commencing on and from the said 1st of *July* in the year 1837, for the yearly rent of 160*l.*, free and clear of and from all taxes and impositions of every kind, which are to be paid and discharged by the said *J. Latch*, his executors and administrators." (a) "As witness the hands of the said parties hereto on the 3d day of *October* 1835.

" (Signed)

" *Joseph Latch*.

" *Thomas Wedlake*.

" *Lewis Thomas*."

" Witness *Richard Mulloch*."

(a) There were also clauses empowering *Latch* to determine the agreement at the end of a year, and for other purposes, which it is not material to state.

Rosser

Rosser Thomas was not present at the execution of this agreement, and never signed it; nor was it ever acted upon. At the time of the execution, the plaintiff and defendants and *R. Thomas* were acting under a similar agreement, signed by all, which was to expire on 1st *July* 1837. There had been another of the same nature between these parties. Evidence was given that agreements for the delivery of coal, commencing at a future day, were usual in *Monmouthshire*. In *July* 1837, *R. Thomas* was requested to sign the above instrument, but declined, saying that he considered the agreement at an end. There was also evidence that the plaintiff had spoken of his interest in the supply of coals from the *Curn Gethin Collieries* as terminating on *July* 1st, 1837 (a). The learned Judge was of opinion that, on this case, the agreement was proved, the defendants having signed it both for themselves and for *Rosser Thomas* as their partner, and such signature being within the scope of their authority as partners. He therefore directed a verdict for the plaintiff on the first and third issues.

A rule nisi for a new trial was obtained in the following term, on account of misdirection as to these issues, and on another ground, not material here. In last *Hilary* term (b),

Talfourd Serjt. and *Talbot* shewed cause. *Wedlake* and *Lewis Thomas* had a right to bind the partnership by this agreement; it was for a legitimate partnership object, and was like former contracts between their firm and the plaintiff: and there is no reason to suppose

1840.

 LATCH
 against
 WEDLAKE.

(a) See the statement as to this in the judgment, p. 965. post.

(b) *January* 23d. Before Lord Denman C. J., *Littledale, Williams,* and *Coleridge* Js.

that

1840.

LATCH
against
WEDLAKE.

that *Rosser Thomas* was not cognizant of the agreement, or was likely to dissent from it. When applied to on the subject, he did not deny that the contract had been made, but said that it was at an end. There is no evidence that the instrument signed was in the nature of an escrow. The case is within the principle of *Sandilands v. Marsh* (a) and *Helsby v. Mears* (b), and the doctrine laid down by *Tindal C. J.* in *Fox v. Clifton* (c). Further, the defendants, having represented this as an agreement by which they could at least bind themselves, are estopped from saying that another partner's signature was required; *Lucas v. De la Cour* (d), *Bass v. Clive* (e); and this estoppel is the stronger where a party has acted upon the representation; 2 *Stark. Ev.* 18. (2d ed.). And, lastly, whether this was a partnership instrument or not, the defendants who actually signed are liable; Note (4) to *Cabell v. Vaughan* (g); *Strangford v. Green* (h), *Fletcher v. Dyche* (i), *Elliot v. Davis* (k), *Richards v. Heather* (l). The non-joinder of *Rosser Thomas*, if material, should have been pleaded in abatement.

Sir *J. Campbell*, Attorney General, and *Whateley*, contra. There was no sufficient evidence for the plaintiff on the first and third issues: but at all events the learned Judge was wrong in directing a verdict on those issues as matter of law. He should have left it to the jury to say, under the circumstances proved, whether the defendants ever intended to be bound if *Rosser Thomas* did not execute the agreement. The facts shew that they

(a) 2 B. & Ald. 673.

(c) 6 Bing. 776. 792.

(e) 4 M. & S. 13.

(h) 2 Mod. 228.

(k) 2 B. & P. 338.

(b) 5 B. & C. 504.

(d) 1 M. & S. 249.

(g) 1 Wms. Saund. 291 b. 291 h.

(i) 2 T. R. 32.

(l) 1 B. & Ald. 29.

did

did not. The interest of *Wedlake* and of *Lewis* and *Rosser Thomas* in the coals was joint; they could not intend to be separately bound in respect of them, nor could the plaintiff suppose they did. The language of the contract does not import a joint and several liability. *Rosser Thomas* has signed former agreements of the same nature. And, in fact, he was on this occasion ultimately called upon to sign, which shews the real understanding among the parties. It was not within the scope of a partnership authority to bind *Rosser Thomas* in 1835, by a contract to begin taking effect in 1837. [Lord Denman C. J. The learned Judge's report says there was evidence that such prospective agreements were usual in *Monmouthshire*.] The agreement here is not only for the delivery of coals, but for the demise of land in which *Rosser Thomas* appears to have had an interest. This forms part of one entire consideration for the plaintiff's agreement: if *Rosser Thomas* was bound by any part of the contract, he was bound as to the land. But an agreement like this cannot have such a consequence, merely because it relates partly to coals. As long as this instrument was unsigned by *Rosser Thomas*, he could have no remedy against *Latch* upon it, and therefore was not himself liable under it. Nothing existed here but a proposed agreement, never perfected: in this respect the case resembles *Meigh v. Clinton* (a). It is contended that, although *Rosser Thomas* is not bound, the defendants who actually signed are. But this argument might be carried to the length of saying that, if ten persons have proposed entering into a contract, and one only signs, he is liable to the whole extent of the agreement.

1840.

 LATCH
 against
 WEDLAKE.

Cur. adv. vult.

(a) *Antè*, p. 418.

Lord

1840.

LATCH
against
WEDLAKE.

Lord DENMAN C. J., in this term (*April 28th*), delivered the judgment of the Court.

This was a motion to enter a verdict for the defendant, or to have a new trial, upon two grounds : the first, that as to two issues the learned judge had taken upon himself to direct a verdict to be entered for the plaintiff, which direction was complained of as erroneous, or at least that the issues raised a question of fact on which the opinion of the jury should have been taken : the second, which turned upon the rescission of an agreement, was not much contested on the argument ; and we are of opinion that that question was properly left to the jury, and that there is no ground for disturbing their finding.

The question involved in the two first-named issues was the existence of an instrument as a complete and binding agreement, upon which the action was brought. Upon the face of it, it bore date *October* the 3d, 1835, and purported to be made between one *Rosser Thomas* and the defendants of the one part, and the plaintiff on the other ; and by it the parties of the first part agreed to sell and deliver to the plaintiff a certain supply of coals from certain collieries for the term of three years, to commence on the 1st *July* 1837, at a certain price, and with certain stipulations as to carriage, place of delivery, times, and mode of payment, &c. The instrument also contained a stipulation for a lease by the parties of the first part, to the plaintiff, of a wharf, the place of delivery, for the same period, at a specified rent. At the date of this instrument the parties were acting under a similar agreement, which was to expire on the 1st *July* 1837. This instrument was duly executed by the plaintiff and the defendants, but not by *Rosser Thomas* ;

Thomas; and it was proved that, upon an application made to him in the month of *July* 1837 to execute it, he had declined to do so, stating that he considered the agreement at an end. Evidence, also, was given that the plaintiff, in the course of a negotiation into which he had entered with third persons respecting a joint supply of coals, had repeatedly spoken of his interest in the supply of coals from the collieries in question as expiring on the 1st *July* 1837, and had never spoken of his having any interest in it beyond that time, although his means of supply were then under calculation, and he was informed that other persons had agreed for the coals from those collieries after that date.

It was contended, in support of the direction, that this was a partnership transaction, and that the two defendants by their execution had bound *Rosser Thomas*, or that at all events they had thereby made themselves liable on the instrument. But, without questioning the general truth of the principles on which these positions are grounded, we think that the circumstances above mentioned raised a prior question proper to have been submitted to the jury, whether the intention of all the parties was not that *Rosser Thomas* should be an actual party to the agreement; whether the plaintiff, on his part, did not contract on the faith that *Rosser Thomas* should join, and he thereby have his additional security for the performance of the agreement; and whether the defendants, on theirs, did not execute upon the understanding that *Rosser Thomas* was consenting to and would join in executing the instrument. If the jury had so thought, the transaction would, under the circumstances found, have been incomplete; for, wherever an instrument is to be executed by several parties, there must be some

1840.

 LATCH
 against
 WEDLAKE.

1840.

LATCH
against
WEDLAKE.

interval between the execution of each, and, if all be not present at the same time, that interval may be considerable; and it cannot be contended that the mere fact of execution by one conclusively binds him, where that has been done on the faith that all will execute, and any one shall refuse. We are of opinion, therefore, that this case should go down again, in order to submit this question to the jury.

Rule absolute.

LANE *against* CHAPMAN, Esquire.

Where the loser of money at play gave a bill for the amount to the winner, who indorsed it to an innocent party, and such indorsee commenced an action against the drawer, took a cognovit from him in the action, and proceeded to judgment (stat. 5 &

CASE against the Marshal of the *Marshalsea*, for permitting the escape of *Augustus Newton*, who was taken by the sheriff of *Middlesex* in execution for damages recovered against him by plaintiff, by the judgment of the Court of Exchequer, in an action upon promises. The declaration stated that *A. N.*, so being in custody of the sheriff, was brought by habeas corpus before *Patteson J.* at his chambers, and by him committed to the custody of the marshal (defendant), among other things in execution for the damages afore-

6 *W. 4. c. 41.* not being yet in force),

Held, that defendant could not afterwards impeach the judgment as void by stat. 16 *Car. 2. c. 7. s. 3.* and 9 *Ann. c. 14. s. 1.*; for that those clauses avoided judgments voluntarily given by the loser as security for money lost, but not a judgment obtained adversely by an innocent party, the defendant having had an opportunity of setting up the illegality of the bill as an answer to the action. But,

Held, that, if the defendant could have impeached the judgment as void by the last mentioned statutes, the Marshal of the Queen's Bench might have pleaded its nullity in an action against him for permitting the escape of such defendant when taken in execution upon the judgment.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the statutes against gaming, 16 *Car. 2. c. 7. s. 3.*, and 9 *Ann. c. 14. s. 1.*, avoided judgments obtained from the loser by the winner as security for money lost, but not judgments which the winner, or a third party claiming through him, recovered against the loser by action.

said,

said, by virtue of which committitur defendant kept *A. N.* in his custody, in execution &c. Nevertheless, &c.

1840.

LANE
against
CHAPMAN.

Plea, averring that *A. Newton* lost sums of money to *Edward Claude Marsack* and another, at cards and by betting, to the amount of more than 100*l.* at one time (the particulars of which losses were stated): and that, “the said several sums having been so lost and won as aforesaid, the said *A. N.* did not pay the same at the time when he so lost the same, and, for securing the payment thereof, and for and in consideration of the same, did, towit on” &c., “draw his bill of exchange,” at two months, on certain bankers, payable to the said *E. C. Marsack* for 127*l.*, the amount won. The plea then stated that the payee “indorsed and delivered the said bill to the plaintiff, and, the said bill being unpaid, he the plaintiff afterwards, towit on” &c., commenced an action on promises against *A. N.* in the Court of Exchequer for the recovery of the said sum payable by the said bill: “and such proceedings were thereupon had that the said *A. N.* afterwards, towit on” &c., “then being in custody of the sheriff of the county of *Middlesex* in the said action at the suit of the plaintiff, gave and executed to the plaintiff his the said *A. N.*’s cognovit in the said action, thereby confessing the same, and the damages by the plaintiff sustained by reason of the nonpayment by the said *A. N.* of the said bill of exchange; and such further proceedings were thereupon had in the said action and upon the said cognovit that afterwards, towit on” &c., “and before the making and passing of an act of parliament” &c. (5 & 6 *W. 4. c. 41.*) (a), “the plaintiff obtained and recovered a judg-

(a) See *Hitchcock v. Way*, 6 *A. & E.* 943.

1840.

—
LANE
against
CHAPMAN.

ment therein, and whereby the said Court" of Exchequer, "before the making and passing of the said act of parliament last above mentioned, considered and adjudged that the plaintiff should recover against the said *A. N.* the sum of 304*l.* 9*s.* 6*d.* for his damages by him sustained, as well on occasion of the not performing certain promises before then made by the said *A. N.* to the plaintiff as for his costs;" and which said judgment was and is the identical judgment in the said declaration mentioned. Averment, "that the said promises in the said judgment mentioned, and for the nonperformance of which the said action was brought, were the promises of the said *A. N.* made by him for the payment of the said bill of exchange: by reason of which said premises the said judgment was and is utterly void in law, frustrate, and of none effect." Verification.

Demurrer, assigning for causes (among others) that it was the duty of defendant, as marshal, to obey the orders of the Court of K. B. and Q. B., and keep the prisoners entrusted to him till discharged by due course of law: and that it is not competent to him to dispute the judgment of the Court in the declaration mentioned; nor can he plead any matter in this action which would have been a defence to *A. Newton* in the action against him, and which *A. N.* omitted to plead: that, for any thing that appears by the plea, plaintiff had a good cause of action against *A. N.*, upon a bill indorsed to plaintiff: and that the said judgment, until reversed, is such a judgment as cannot in this action be objected to by the defendant as marshal. Joinder.

The demurrer was argued in this term (*a*).

(*a*) May 1st. Before Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

Knowles,

Knowles, for the plaintiff. The marshal's defence is founded on stat. 16 *Car.* 2. c. 7. s. 3., which enacts that, in the case of certain gaming debts there specified, the loser shall not be compelled to pay or make good the same; "but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements and other acts, deeds and securities whatsoever, which shall be obtained, made, given, acknowledged or entered into for security or satisfaction of or for the same or any part thereof, shall be utterly void and of none effect;" and on stat. 9 *Ann.* c. 14. s. 1., which enacts that "all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities, shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards," &c., "or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent, or advanced for such gaming or betting, as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting, as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever."

Now, first, these clauses do not render this judgment on *cognovit* void. The words appear strong; but the policy of the acts will be satisfied by construing them as rendering judgments void only as between the guilty

1840.

 LANE
 against
 CHAPMAN.

1840.

 LANE
 against
 CHAPMAN.

parties. Even bills are not literally void under these acts, for all purposes; if they were, an indorsee for value could not sue the drawer of a bill accepted for a gaming debt, though the contrary was decided in *Edwards v. Dick (a)*, where *Holroyd J.* illustrates the subject by referring to the decisions on stat. 13 *Eliz. c. 10. s. 3.*, as to ecclesiastical leases thereby declared "utterly void and of none effect." It is true that the judgment of *Abbott C. J.*, in that case, may appear unfavourable to the plaintiff here, who, as indorsee, derives title from the winner and sues the loser. But the observations there made do not apply where the loser, in an action upon the bill, waives the defence of gaming, which he might set up, and gives a cognovit, on which the holder of the bill obtains judgment. The statutes relate only to judgments given by the loser as security to the winner; not to a judgment obtained, as here, by the bonâ fide indorsee of a bill: and, in practice, even judgments to which the loser and winner are parties are not treated as absolutely void, but a motion is made to set them aside. This was done in *Davison v. Franklin (b)*, and terms imposed; and, in *George v. Stanley (c)*, where bills given for a gaming debt had been negotiated, and the loser confessed judgment at the suit of the holder, application was made to the Court of Common Pleas to set the judgment aside, and they directed an issue to try whether the plaintiff were implicated in the gaming. If the securities in those cases had been absolutely void, the courts could have had no discretion. Here, therefore, the Court, even if moved by the original defendant, might have exercised a discretion as to granting the rule

(a) 4 *B. & Ald.* 212.(b) 1 *B. & Ald.* 142.(c) 4 *Taunt.* 683.

unconditionally,

unconditionally, or at all. *Cuthbert v. Haley* (a) was decided when the law as to securities affected with usury (under 2 stat. 12 *Ann. c. 16. s. 1.*, and before stat. 58 *G. 3. c. 93.*) resembled the law in force as to gambling securities at the time to which this plea relates. In that case one *Plank* discounted notes to the maker at usurious interest, and obtained credit on them with his own bankers, who presented the notes to the maker when due; and he, not being able to pay, gave a bond for the amount. The bankers, who had never been apprised of the usury, sued on the bond, and were held entitled to recover. Lord *Kenyon* said, "I admit that the securities themselves that are tainted with usury cannot be enforced in a court of justice, even though they be in the hands of innocent purchasers for a valuable consideration without notice." "And therefore the plaintiffs, in this case, could not have maintained any action on the notes given by the defendant to *Plank*. But here the notes were destroyed after they got into the hands of the plaintiffs, and the bond in question was given to them, they not knowing of the usury between *Plank* and the defendant. I admit that, if one security be substituted for another by the parties in order to get rid of the statute against usury, the substituted as well as the original security will be void: but it is not pretended that that was the case here." And *Le Blanc J.* said, "The authorities only warrant us in deciding that the substituted security, which has been given for a security contaminated (if I may use the expression) by usury is void if such substituted security be given either to the party to the original contract, or to his re-

1840.

 LANE
 against
 CHAPMAN.
(a) 8 *T. R.* 390.

1840.

 LANE
 against
 CHAPMAN.

presentative, his executor. But I am not aware of any case in which it has been holden that where the original security given to one person has been cancelled and another security given to another person, ignorant of the usury, that rendered the former security void, such second security is void in the hands of such an innocent person. The case in *Moore*" (*Ellis v. Warnes (a)*), "shews that such a security is a valid one." This decides the present case. The legislature, in framing stat. 5 & 6 W. 4. c. 41., evidently took the same view of the subject. In the recital of that act, s. 1., they express a design to relieve innocent assignees of the securities mentioned in several statutes, and, among others, stat. 16 Car. 2. c. 7. s. 3. and 9 Ann. c. 14. s. 1. The recited clauses make void not only notes, bills, and mortgages, but judgments, and many other securities; yet the remedial act repeals them only as to "any note, bill, or mortgage." The inference is that an innocent party to a judgment did not, in the opinion of the legislature, need this relief, his rights being untouched by the law as it already stood.

Then, secondly, supposing the judgment void in this case, could the marshal, when charged with permitting an escape, allege that the judgment on which the execution issued was not valid? The prisoner is delivered to him for the purpose merely of safe custody: his authority to detain does not originate in the judgment, but in the commitment. And, if he could impeach the judgment, he might do what the debtor himself could not do, having missed his opportunity. "It is a settled rule in law, that if a defendant has a matter

(a) *Moore*, 752. S. C. more fully, *Cro. Jac.* 33.

proper

proper for his defence, and he neglects to plead it in bar to the action at the time he may, he shall never take advantage of it after:" per *Eyre* C. J. in *Earle v. Hinton* (a). "It is an universal principle of law that, if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it either in another action founded on it, or in a *scire facias*:" per *Buller* J. in *Erving v. Peters* (b). Therefore the original defendant here could not, after the *cognovit*, have protected himself by the statutes of gaming. The marshal, if he could now avail himself of them, might also have contested the judgment on *cognovit* if the Court had, in the exercise of their discretion, refused to set it aside, or even if the debtor had been sued on the judgment, defended himself under the statutes, and failed. Besides, the judgment under which the debtor was in execution is a record in full force, and cannot be averred against, or its merits brought in question, while it continues on the files of the Court; *Moses v. Macferlan* (c), *Ramsbottom v. Buckhurst* (d); unless, perhaps, by such a special allegation of fraud in obtaining the judgment as was suggested in *Moore v. Bowmaker* (e).

1840.

 LANE
 against
 CHAPMAN.

Sir *J. Campbell*, Attorney General, *contra*. This case must turn, not on principles of common law, but on the effect of the particular statutes. Then, as to the first point; this judgment is null, not only as between the guilty parties, but as between the present plaintiff and the marshal. By stats. 16 *Car.* 2. c. 7. s. 3. and 9 *Ann.*

(a) 2 *Stra.* 732.(b) 3 *T. R.* 685. 689.(c) 2 *Burr.* 1005. 1009.(d) 2 *M. & S.* 565.(e) 7 *Taunt.* 97.

1840.

 LANE
 against
 CHAPMAN.

c. 14. s. 1. the judgment is “utterly void” and “of none effect.” It is as if no such thing had ever existed; and the enactment is not qualified by the words “between the parties,” or any equivalent ones. The debt is annihilated. When these acts were passed, bonâ fide rights of third persons were disregarded in the anxiety to put down gaming; and effect has been given to the clauses accordingly against innocent indorsees, in *Bowyer v. Bampton* (a) and in other cases, down to *Hitchcock v. Way* (b). It is argued that a judgment of this kind is not absolutely void, because the Court must be moved to set it aside, and that, if the original debtor in this case had so moved, the Court probably would not have granted a rule without terms, if at all; and *Davison v. Franklin* (c) is referred to: but there the defendant, who alleged the illegality of the debt, had before led the party holding the security to believe the debt a good one; it might, therefore, be considered as in dubio whether the allegation of gaming was true or not. Where the judgment is admitted to be in respect of a gaming debt, there can be no ground for refusing a rule to set it aside, except that the assistance of the Court is not wanted. The answer to any argument from *Cuthbert v. Haley* (d) is, that the usury laws and the statutes against gaming are different, and framed with different views. And in the case of usury there is a debt de facto; money has been actually advanced; there would, but for the usurious agreement, be consideration for a promise to pay, even between the original parties; and there might be a good substituted security, even as between them: but in the case of a loss at play there is no original debt,

(a) 2 Stra. 1155.

(b) 6 A. & E. 943.

(c) 1 B. & Ad. 142.

(d) 8 T. R. 390.

and

and no foundation for any subsequent contract; nor could any valid security be substituted, between the first parties, for the bill or other security originally given. [Lord *Denman* C. J. The distinction you take would not apply to money lent to persons gaming; yet that is within the provisions of stat. 9 *Ann. c. 14. s. 1.*] That is a different case from the present. No conclusive argument can be drawn from the omission, in stat. 5 & 6 *W. 4. c. 41. s. 1.*, to repeal the statutes there recited as to judgments. There may be omitted cases in that act; and, if so, the Court cannot supply the defect. The judgment here is not like a judgment in an adverse action. If the drawer of this bill had given a *cognovit* to the payee, it is admitted that, between those parties, the illegality of the debt might have been set up as avoiding the judgment on such *cognovit*: then is it consistent with the statutes of *Charles* and *Anne* that the payee should, by transferring the bill, give another person the benefit of a judgment which he himself could not have enforced? If this were so, the statutes could always be evaded by an indorsement of the bill, and a *cognovit* or warrant of attorney from the loser to the indorsee, the judgment on which, as the plaintiff here contends, could not be averred against.

Secondly, if the judgment here be void to all intents and purposes by the statutes, the marshal may allege that invalidity. The judgment being null, the foundation of the action fails. In actions against the sheriff for escape of a party arrested on mesne process, the plaintiff has often been nonsuited on account of his failing to shew that the proceedings were regular, and the custody therefore legal. In this action, the judgment is a part of the proceedings by which the plaintiff must establish

1840.

LANE
against
CHAPMAN.

1840.

LANE
against
CHAPMAN.

establish his case; and, if he puts in a judgment which the law declares null, he fails, as much as if he produced a document requiring a stamp, but not having one. In *Shirley v. Wright* (a) Holt C. J. says, "If a writ of execution bear teste out of term, the sheriff is justifiable, and yet shall not be liable to an action of escape, for it is a void writ." In *Morgans v. Bridges* (b) a writ issued against *Godfrey Barnett*, but the sheriff arrested *Maurice Barnett*, who was the real debtor, and, when he contracted the debt, had pretended to be *Godfrey*; the sheriff, on learning the truth, discharged him, and was sued for the escape. Lord *Ellenborough* said there: If "the sheriff had in this case detained *Maurice Barnett*, it appears to me that he might have justified it, in case that person had brought an action for the false imprisonment against him." "But this case is different. The question here is not whether the sheriff, in case he had kept *Maurice Barnett* in custody, would have been justified in so doing; but, whether he was bound so to do: because, if he was not so bound to act, he cannot be liable to the present action. And I think that he was not so bound to act." "Then if he was not bound to detain *Maurice Barnett* in his custody, the present action cannot be sustained." So here; the marshal was at least not bound to detain *Newton* on a void judgment; therefore the action does not lie.

As to the rule that a record shall not be averred against, however well that may be established, the legislature may enact the contrary in a particular case; and the question here is, whether that has not been done. But, independently of the statutes, a sheriff or the marshal may shew, in an action grounded on a judgment, that it

(a) 2 *Salk.* 700.(b) 1 *B. & Ald.* 647.

was obtained by fraud or founded on an illegal consideration.

1840.

LANE
against
CHAPMAN.

Knowles, in reply. The effect of the statutes, where they prevent a recovery on the instrument declared void, extends no farther in the case of third persons than the instrument itself: not always even to that; as where the drawer indorses to an innocent party for value. [*Coleridge J.* Is not that a new drawing?] The instrument is still that which the acts make void. The usury and gaming acts have always been considered analogous; and the substituted security in *Cuthbert v. Haley (a)* was a bond, which, by 2 stat. 12 *Ann. c. 16. s. 1.*, if applicable, was "utterly void." The judgments contemplated by the gaming acts are judgments on warrant of attorney given as security by the loser to the winner, not those obtained in the course of bonâ fide legal proceedings by an innocent party. [*Coleridge J.* The words of stat. 16 *Car. 2. c. 7. s. 3.* are "judgments," &c., "obtained, made, given, acknowledged or entered into for security or satisfaction of or for the same."] That judgments are a casus omissus in stat. 5 & 6 *W. 4. c. 41.* is not probable, because they, and all the securities mentioned in the gaming acts, are noticed in the recital of sect. 1. As to averring against the record, if the plaintiff, on nul tiel record pleaded, gave in evidence a regular judgment, the defendant could not go into evidence that it was illegal by statute: the plea would be sustained by merely shewing the judgment. [*Patteson J. Tyler v. The Duke of Leeds (b)* is rather against this part of your argument. There,

(a) 8 *T. R.* 390.(b) 2 *Stark. N. P. C.* 218.

1840.

 LANE
 against
 CHAPMAN.

in an action for a false return to a fi. fa., the sheriff proposed to shew that the judgment was part of a contrivance, between the plaintiff and defendant, parties thereto, to cheat creditors by a fraudulent conveyance, and was therefore void; but Lord *Ellenborough* said, "To say that the judgment is absolutely void, embraces too large a scope; it would endanger all returns; if you can shew that it is clearly void under the statute, I will admit the evidence; but it must be clearly and manifestly so; you cannot go into all the circumstances between the parties." "If you can attack the judgment on any clear and palpable ground, I will hear you."] The judgment there was part of a fraudulent scheme; the case, therefore, differs from this. The ruling is not consistent; the judgment could not well have been proved void under the statute, without going into all the circumstances. A sheriff, in an action of escape, may take advantage of errors in process; but it does not follow that he could allege error in the judgment. [*Coleridge J.* Error is not alleged here; the judgment is admitted to be regular; but the statutes, it is said, supervene, and render it a nullity.] The original defendant in this case has let slip an opportunity of alleging the illegality of the debt; therefore the marshal cannot allege it: the objection to process in the case of a sheriff is not open to any such answer. *Cuthbert v. Haley (a)* is conclusive.

Cur. adv. vult.

Lord DENMAN C. J. in the ensuing vacation (*May 14th*) delivered the judgment of the Court.

Upon these pleadings it must be taken that the

(a) 8 T. R. 390.

plaintiff,

plaintiff, being the bonâ fide indorsee, for value, of a bill of exchange accepted by *Augustus Newton* for a gaming debt, and being ignorant of the consideration for the acceptance, actually sued *A. Newton* upon it in the Court of Exchequer: that *A. Newton*, instead of setting up as a defence that the consideration for the acceptance was a gaming debt, which he undoubtedly might have done with success even against an innocent indorsee, gave a cognovit, upon which judgment was signed, and he was taken in execution, and, being brought up on a writ of habeas corpus, was committed to the custody of the marshal, from which he afterwards escaped. The question is, whether the judgment so signed was absolutely void under either of the statutes 16 *Car. 2. c. 7.* or 9 *Ann. c. 14.*; for, if it was, no reason has been assigned or authority cited which satisfies us that the marshal might not avail himself of its being so void as a defence to the action.

The stat. 16 *Car. 2. c. 7. s. 3.* has these words: "But the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements and other acts, deeds and securities whatsoever, which shall be obtained, made, given, acknowledged or entered into for security or satisfaction of or for the same or any part thereof, shall be utterly void and of none effect." Stat. 9 *Ann. c. 14. s. 1.* has these words: "All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities, shall be for any money"

1840.

 LANE
 against
 CHAPMAN.

1840.
 ———
 LANE
against
 CHAPMAN.

money" "won by gaming" &c., "shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever."

The judgments intended in both acts, as well from the language used as from the other securities in conjunction with which they are mentioned, appear to be voluntary judgments given by the loser, either to the winner or to some one for his benefit, as security for the money lost. Such judgments would undoubtedly be void: but no case has established that a judgment obtained adversely by an innocent party on a negotiable security shall be held void, where the defendant had full opportunity to defend the action and set up the illegality of the security as an answer. Suppose that he had pleaded payment, and the jury had found it against him, and judgment had been signed on that verdict, could it possibly be contended that he might afterwards say that the judgment was void? And in what respect is this different?

Judgment for the plaintiff(a).

(a) See the next case.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

CHAPMAN, Esquire, *against* LANE.

[Monday,
 June 14th,
 1841.]

See marginal
 note, *antè*,
 p. 966.

JUDGMENT having been signed in the preceding case, the defendant brought a writ of error in the Exchequer Chamber, assigning for causes that the plea answered the declaration and was a sufficient defence, and that

that there was no good cause of demurrer, and that judgment was given for the plaintiff *Lane*, whereas it should have been for the defendant. Joinder in error.

1841.

 CHAPMAN
against
LANE.

The writ of error came on for argument in *Trinity* vacation (*June* 14th), 1841, before *Tindal* C. J., *Erskine* and *Maule* Js., and *Parke*, *Alderson*, *Gurney*, and *Rolfe* Bs.

Sir *J. Campbell*, Attorney General, for the plaintiff in error, the defendant below. *Newton* was not lawfully in custody, for the execution had issued on a voluntary, not an adverse, judgment; and such a judgment is void by stats. 16 *Car.* 2. c. 7. s. 3. and 9 *Ann.* c. 14. s. 1. [*Parke* B. The cognovit, though voluntarily given, was in an adverse action.] The bill was void as against *Newton*. [*Parke* B. He had let slip the opportunity of defending under the statutes.] The clauses cited are general enough to include judgments given after action brought. The plaintiff must interpolate a condition that no action shall have been commenced. But the rule now is to abide by the letter of a statute unless the result be an absurdity. [*Alderson* B. It would follow from your argument that, even if there had been an issue tried, it might be tried again in an action for an escape. Does not that come to an absurdity?] Stat. 16 *Car.* 2. c. 7. s. 3. avoids "all and singular judgments," and stat. 9 *Ann.* c. 14. s. 1. all "judgments" "whatsoever." [*Tindal* C. J. The question is, whether the stat. 16 *Car.* 2. s. 3. avoiding the judgments, and other matters there specified which shall be obtained, made, &c., must not be taken distributively. *Parke* B. The words "obtained, made, given, acknowledged or entered into for security or satis-

1841.

CHAPMAN
against
LANE.

faction of or for the same," seem applicable to cases where a party obtains the security of a judgment without trial of an issue.] The clause must be read "all judgments" "obtained" or "given." A judgment after trial would be "*obtained*." [Rofe B. A judgment after trial is *recovered*. Alderson B. A verdict is *obtained*, a judgment recovered. Parke B. And the expression here, is "judgments" &c., "and *other* acts, deeds and *securities*."] A judgment entered up becomes a security. [Parke B. I think this applies to judgments originally obtained as security.] Stat. 9 *Ann. c. 14. s. 1.* certainly does not carry the case farther for the plaintiff in error, because the words there are, all "judgments," &c., "or other securities or conveyances," where the "consideration of such *conveyances or securities*" (omitting the word "judgments") shall be money won by gaming. On the view now taken, the whole question is, whether the words "other securities" are a key to the meaning of the two clauses. The argument turns entirely on the construction of the statutes.

Knowles, *contra*, was stopped by the Court.

TINDAL C. J. It appears to us that the decision of the Court below is right. The question must depend on the construction of the statutes, and, looking to both, and especially to the statute of *Anne*, we think that the judgment, in this case, was not avoided. The words of stat. 16 *Car. 2. c. 7. s. 3.*, "judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills," &c., and "obtained, made, given, acknowledged or entered into for security or satisfaction" &c., must be taken distributively. And the "judgments" cannot be judgments in actions upon the bills here mentioned, because,

cause, if so, the statute would give a party sued on such a bill the choice of two defences: he might omit to plead the statute, wait till judgment was signed, and then allege that it was invalid because founded on a gaming debt, though the rule is that a judgment shall be conclusive. If the present judgment, for these reasons, was binding on the original parties, it would be strange if a third person could avail himself of the statutes to set it aside. Stat. 9 *Ann. c. 14.* is still less favourable to the plaintiff than the statute of *Charles*. (His Lordship here read the material parts of stat. 9 *Ann. c. 14. s. 1.*) We are, therefore, of opinion that the judgment of the Court below must be affirmed.

1841.

CHAPMAN
against
LANE.

The rest of *The Court* concurred.

Judgment affirmed.

SKEATE *against* BEALE.

DEBT. The declaration stated that, whereas, before and at the time of the making of the agreement hereinafter mentioned, certain arrears of rent, amounting &c., towit 19*l.* 10*s.*, had become and were due and in arrear to plaintiff for and in respect of cer-

In debt, the declaration stated that, arrears of rent being due from defendant to plaintiff, and plaintiff having distrained for the arrears, defendant, by

writing, in consideration of plaintiff withdrawing the distress, undertook that he would pay the arrears, and, in default of his so doing, plaintiff might take steps to recover them; that plaintiff did withdraw the distress, but defendant paid only a part of the arrears.

Plea. That plaintiff had distrained for more than was due, the sum paid by defendant being all that was in arrear, and that plaintiff menaced, and was about, to sell the distress, unless defendant made the agreement, which defendant therefore made. Held bad, on motion for judgment non obstante veredicto: duress of goods not being a ground for avoiding an agreement.

Defendant also pleaded that no part of the arrears agreed to be paid was due, except the sum paid by defendant, and that, except in respect of so much, there was no consideration for the agreement. Held bad, on motion for judgment non obstante veredicto, there being a lawful consideration (whether the larger or smaller sum were due), the adequacy of which could not be discussed.

1840.

SKRATH
against
BEALE.

tain lands and premises under and by virtue of a certain entire demise thereof, and plaintiff, before and at the time of the making of the said agreement, had distrained, in and upon a certain part of the said lands and premises, divers goods &c. of defendant then being in and upon the said part of the said lands and premises, and being of great value, towit 19*l.* 10*s.*, as a distress for the said arrears of rent (and which said arrears, as to 16*l.* 2*s.* 6*d.*, parcel thereof, still remain due and unpaid), and, at the time of the making the said agreement, plaintiff continued and was in possession of the said goods &c., and held the same as such distress as aforesaid; and thereupon, before the commencement of this suit, towit on 16th *February* 1838, by a certain memorandum of agreement, bearing date a certain &c., towit the day and year aforesaid, and then made by and between plaintiff and defendant, it was agreed in manner and form following, that is to say: in consideration of the plaintiff withdrawing the said distress then in force against the goods and chattels of the defendant for the said sum of 19*l.* 10*s.*, the defendant undertook to pay down the sum of 3*l.* 7*s.* 6*d.* in part payment of the above sum, and, in consideration as aforesaid, the defendant also undertook and agreed, within one month from the date of the said agreement, to pay to the plaintiff 16*l.* 2*s.* 6*d.* (being the balance due upon the said sum of 19*l.* 10*s.*), and that, in default of defendant so doing, plaintiff should be at liberty to levy a distress upon the goods and chattels of defendant for the recovery thereof, or take any other steps for the recovery of the same as he might think proper: averment that plaintiff, confiding &c., did then, towit on &c., under
and

and in pursuance of the said agreement, withdraw the said distress, and did then quit and deliver up possession of the said goods &c. so distrained, to defendant, whereof defendant then had notice: and, although defendant, in part performance of the said agreement, did then, towit on &c., pay down to plaintiff the said sum of 3*l.* 7*s.* 6*d.*, in part payment of the said sum of 19*l.* 10*s.* in the said agreement mentioned, and although the said period of one month from the date of the said agreement had elapsed before the commencement of this suit, yet defendant did not pay the 16*l.* 2*s.* 6*d.*, or any part thereof, within the said period, or at any other time.

Pleas. 1. Not guilty. Issue thereon.

2. That, just before the making of the said agreement in the declaration mentioned, towit on 16th *February* 1838, plaintiff had wrongfully and injuriously seized, taken, and distrained divers goods and chattels of defendant, of great value, towit 20*l.*, under colour and pretence, and in the name, of a distress for a large sum of money, towit 19*l.* 10*s.*, then pretended by plaintiff to be due to him for arrears of rent of certain lands and premises, whereon the said goods and chattels of defendant then were: whereas, in truth and fact, a small part only, towit 3*l.* 7*s.* 6*d.*, was due to plaintiff for and on account of the said rent: and plaintiff then menaced and threatened, and was about, to sell and dispose of the said goods and chattels of defendant, unless defendant would enter into and make the agreement in the declaration mentioned: and defendant then, by reason and in consequence of the premises, and in order to prevent the sale and disposing of his said goods and chattels, did on that occasion enter into and make the said agree-

1840.

 SEIZURE
 against
 BEALE.

1840.

SENATE
against
BEALK.

ment in the declaration mentioned. Verification. Replication. That the said agreement in the said declaration mentioned was not obtained from defendant by means of such wrongful and injurious seizing, taking, and distraining of the said goods and chattels of defendant, under such false colour and pretence, as in the second plea in that behalf mentioned, in manner and form &c. : conclusion to the country. Issue thereon.

3. That no part of the said sum of 19*l.* 10*s.*, except the said said sum of 3*l.* 7*s.* 6*d.* parcel thereof, so paid by defendant to plaintiff as in the declaration mentioned, was due or in arrear to plaintiff in manner and form as in the declaration is alleged; and that there was no consideration for the making of the agreement in the declaration mentioned, except in respect of the said sum of 3*l.* 7*s.* 6*d.* so paid as aforesaid, or for the payment by defendant of any part of the said sum above demanded: Verification. Replication: that, at the time of the making of the agreement in the said declaration mentioned, the full sum of 19*l.* 10*s.*, and every part thereof, was due and in arrear to plaintiff, in manner and form &c.; and that there was a good and sufficient consideration for the making of the said agreement, towit to the full amount of the said sum of 19*l.* 10*s.*, and for the payment by defendant of the said sum of 19*l.* 10*s.*, and every part thereof, in manner and form &c. : conclusion to the country. Issue thereon.

On the trial before *Coltman J.*, at the *Somersetshire* Summer assizes, 1838, a verdict was found for the plaintiff on the first issue, and for the defendant on the last two. In *Michaelmas* term 1838, *Erle* obtained a rule nisi for entering judgment for the plaintiff on the last

two issues, non obstante veredicto (a). In last *Hilary* term (b),

1840.

 SEATE
 against
 BEALE

T. W. Saunders shewed cause. The argument for the plaintiff will be that a written agreement is not void because obtained by wrongful duress of goods. If there had been no written agreement, and the whole money had been paid in order to release the goods, it is clear that the surplus, beyond the defendant's just claim, might have been recovered by an action for money had and received; *Astley v. Reynolds* (c). There, indeed, a doubt seems to have been suggested whether a bond obtained by duress of goods could be avoided. But it is difficult to understand why any distinction should be made, in this respect, between an actual payment and a written engagement to pay; the probability, indeed, is that a party would be more cautious in making a payment than in writing a memorandum. In *Atlee v. Backhouse* (d) *assumpsit* was brought for money paid under a seizure alleged to be illegal; and the plaintiffs failed. But there the plaintiffs had expressly agreed to waive the objection to the seizure; and that fact is relied upon by *Parke B.* (e), who assumes that money paid to obtain goods unlawfully detained may be recovered back. Here, after verdict, the seizure must be taken to be illegal. [*Coleridge J. Lindon v. Hooper* (g) is a strong case against you.] That seems

(a) The rule was also for a new trial: but, as the judgment of the Court related only to matter on the record, it is not thought necessary to state the facts, or the arguments respecting them.

(b) *January 18th.* Before Lord Denman C. J., *Littledale and Coleridge Js.*

(c) 2 *Str.* 915.

(d) 3 *M. & W.* 633.

(e) 3 *M. & W.* 650.

(g) 1 *Cowp.* 414.

1840.

SKENE
against
BEALE.

to have been decided on the ground that trespass, for taking the goods, was a fitter remedy than money had and received, for a payment made to recover them, because the defendant, in the latter action, would be taken by surprise, not being able to anticipate the ground on which the distress was to be resisted (a). But now this difficulty is obviated by the new rules of pleading. The plaintiff, who insists upon his forbearance as a consideration, must shew that the right which he forbore to enforce against the defendant was a valid right; *Jones v. Ashburnham* (b). Here the plaintiff knew that he had no right. [*Coleridge J.* referred to *Knibbs v. Hall* (c).] There the distress was only threatened; there was no actual duress of goods. [*Littledale J.* cited *Hamlet v. Richardson* (d).] The process, in that case, had been sued out bonâ fide by the party who received the money for forbearance.

Erle, contra. The record does not suggest any knowledge by the plaintiff that his original claim was unfounded. The distress was good, if any thing at all was due; and the record admits that something was due. Therefore, whatever the party distrained upon chose to pay, for the purpose of getting rid of the distress, would have been paid upon good consideration, and could not be recovered back. *Lindon v. Hooper* (e) cannot be distinguished; and the principle of *Knibbs v. Hall* (c) applies; for a threat of distress, if believed, is compulsory, as much as an actual distress. In *Atlee v. Backhouse* (g) the plaintiff was held to be rightly non-suited, even on his own assumption of the illegality of the

(a) 1 *Cowp.* 418.(c) 1 *Exp.* 84.(e) 1 *Cowp.* 414.(b) 4 *East*, 455.(d) 9 *Bing.* 644.(g) 3 *M & W.* 633.

seizure. In *Longridge v. Dorville* (a) it was held to be a good consideration, in assumpsit, that the plaintiff gave up property belonging to defendant, which plaintiff had detained, though his right to do so was doubtful. But, generally, duress of goods is no ground for avoiding a written agreement. In *Sheppard's Touchstone*, p. 61., instances are given in which deeds are avoided by personal duress; but it is said, "If one distrain my beasts, to compel me to seal a deed, and will not deliver them unless I do so, and threaten me that if I take the beasts again and not seal the deed he will kill me, and thereupon I seal the deed; this is a good deed and shall bind me."

1840.

 SEKEATE
against
BEALE.

Cur. adv. vult.

Lord DENMAN C. J., in this term (May 7th), delivered the judgment of the Court.

This was a motion for leave to enter judgment for the plaintiff, notwithstanding the verdict which has passed for the defendant on two pleas. The declaration is upon an agreement; and it states a distress upon lands in the occupation of defendant, for 19*l.* 10*s.* of rent; and that, in consideration that plaintiff would withdraw the distress, defendant undertook to pay down 3*l.* 7*s.* 6*d.* in part, and the remainder, 16*l.* 2*s.* 6*d.*, within one month from the date; and, in default thereof, plaintiff was to be at liberty to distrain afresh, or take any steps he might think proper for the recovery of the money. Performance on the plaintiff's part is alleged, and payment by the defendant of the 3*l.* 7*s.* 6*d.* A breach is then assigned in the non-payment of the 16*l.* 2*s.* 6*d.*

(a) 5 B. & Ald. 117. See *Haigh v. Brooks*, 10 A. & E. 309. *Brooks v. Haigh*, 10 A. & E. 323.

To

1840.

SEIZURE
against
BEALE.

To this the defendant pleads that, before making the agreement, the plaintiff had wrongfully distrained defendant's goods to the value of 20*l.*, under pretence of a distress for 19*l.* 10*s.*, pretended to be due for rent, whereas in fact only 3*l.* 7*s.* 6*d.* was due; and the plaintiff menaced, and was about, to sell the said goods, unless defendant would enter into the said agreement: and, by reason of the premises, and in order to prevent the sale, defendant entered into the agreement.

We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and, with regard to the former, the law is laid down in 2 *Inst.* 483. and *Sheppard's Touchstone*, p. 61, and the distinction pointed out between duress of, or menace to, the person, and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy: a man, therefore, is not bound by the agreement which he enters into under such circumstances: but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert^(a). It is not necessary now to enter into the consideration of cases in which it has been held that money paid to redeem goods wrongfully seized, or to prevent their wrongful seizure, may be recovered back in an action for money had and received: for the distinction between those cases and the present, which must be taken to be that of an agreement,

(a) See *The Duke de Cadaval v. Collins*, 4 *A. & E.* 858. *Wilson v. Ray*, 10 *A. & E.* 82,

not compulsorily but voluntarily entered into, is obvious. *Lindon v. Hooper* (a) and *Knibbs v. Hall* (b) are, however, authorities to shew that, even if the money had been paid in this case, instead of the agreement to pay it entered into, no action for money had and received could have been sustained by the now defendant. For, although there is a difference in the circumstances, and, the distress having been made, and some rent admitted to be in arrear, no replevin could have been successfully made, yet, if the plaintiff distrained goods of the value of 20*l.* when little more than 3*l.* were due, there is no doubt that, on payment of the value of the goods, or the sum claimed, an action would have lain for the excessive distress. And it is of great importance that parties should be holden to those remedies for injuries which the law prescribes, rather than allowed to enter into agreements with a view to prevent them, intending at the time not to keep their contracts. In the argument for the defendant, reliance was placed on the facts that the agreement was entered into under protest, and that the plaintiff must have known that only the smaller amount of rent was due. It is unnecessary to consider what the effect of these would have been; for neither of them is alleged in the plea. As, therefore, this plea relies solely on the menace as to the goods, under which the agreement was made, for avoiding it, we think it discloses no answer to the declaration.

The third plea remains to be considered. In this the defendant alleges that only 3*l.* 7*s.* 6*d.* of the 19*l.* 10*s.* were due, and that there was no consideration for making the agreement, but the said sum of 3*l.* 7*s.* 6*d.*

(a) 1 *Cowp.* 414.(b) 1 *Esp.* 84.

1840.

 SEAFORTH
 against
 BEALE.

But,

1840.

**SKATE
against
BEALE.**

But, as this plea does not deny the facts of the claim made by plaintiff for the larger sum, the distress in consequence, the agreement entered into, such as the declaration describes, and the distress thereupon withdrawn, it appears that, as a consideration for the agreement, the plaintiff forewent the benefit of the immediate security and payment of the whole rent, and the defendant gained the immediate withdrawal of the distress. Both of these were entirely collateral to the question, whether the larger or smaller sum was in fact due, and formed a sufficient consideration for the agreement, even though the claim to the larger should in the end be decided to be unfounded, as by the verdict it must be taken to have been. The consideration being not unlawful, we cannot enter into its adequacy (*a*). And it may be observed, in general terms, that arrangements of this kind often have the effect of obliterating the proof of the former state of the accounts between the parties. We think, therefore, that this plea is also bad, and that the rule must be absolute for judgment, notwithstanding the finding; which makes it unnecessary to consider the second part of the plaintiff's application, which was for a new trial.

Rule absolute for judgment non
obstante veredicto.

(*a*) *Hitchcock v. Coker*, 6 A. & E. 438. 456.

1840.

CHARLETON *against* ALWAY.Wednesday,
May 13th.

TRESPASS for seizing, selling, and converting plaintiff's ox. Plea, Not guilty, by statute.

On the trial, before Lord Abinger C. B., at the *Gloucestershire* Summer assizes, 1838, it appeared that the plaintiff was vicar of the parish of *Elberton* in *Gloucestershire*, and occupied the vicarial tithes and glebe. The rectorial tithes had been redeemed by the owner thereof, the Bishop of *Bristol*, and leased to plaintiff's father; but plaintiff was in the beneficial occupation of them. In 1837, plaintiff was assessed to the land-tax as follows.

Rental.	Names of Proprietors.	Names of Occupiers.	Names or Description of Estates.	Sums assessed and not exonerated.
£ 195	Charleton, Rev. I. K.	Himself	Rectorial and vicarial tithes	£ s. d. 13 16 3
65	Rev. I. K. Charleton.	Himself	Vicarage house and glebe land	4 12 0

The rectorial tithes had been assessed at 2*l*.

On 1st *January* 1838, the defendant, being collector of the land tax, demanded of the plaintiff 6*l*. 18*s*. 1½*d*. for the tithes, and 2*l*. 6*s*. for the house and glebe, as the moiety of the whole assessment, up to the expiration of

Plaintiff, being vicar of *E.*, and owner and occupier of the vicarial tithes, and being also occupier of the rectorial tithes, which belonged to *B.*, and on which the land tax had been redeemed, was assessed to the land tax in a gross sum for the vicarial and rectorial tithes. The whole sum, up to the quarter day last past, being demanded by defendant, who was collector, plaintiff refused to pay the sum at which the rectorial tithes had been redeemed, but paid the residue of the assessment. The collector distrained on him, under stat. 38 *G. 3. c. 5. s. 17.*, for the amount with-

held. The distress warrant did not specify the property. Held,

1. That the distress was illegal, as being for a sum not due, and because the assessment should have separated the tithes belonging to different proprietors, under stat. 20 *G. 3. c. 17. s. 3.*

2. That trespass lay for the distress, and that plaintiff was not bound to appeal, under sect. 8 of stat. 38 *G. 3. c. 5.*

3. That, the demand having been made for a sum alleged to be due for a quarter then expired, defendant could not justify the distress by shewing that a sum was due at the expiration of the current quarter for vicarial tithes, which would cover the sum distrained for.

4. Plaintiff had demanded and received a copy of the warrant: Held, that he was not bound to join, as defendants, the commissioners who issued the warrant, stat. 24 *G. 2. c. 44. s. 6.* being inapplicable, though the commissioners were also acting magistrates for the division.

the

1840.

CHARLETON
against
ALWAY.

the preceding quarter. The plaintiff paid the 2*l.* 6*s.*, and also 4*l.* 19*s.*; but refused to pay the rest. The defendant signed and gave to plaintiff the following receipt.

“Received, this 1st day of *January* 1838, the sum of 2*l.* 6*s.* for land tax on vicarage house and glebe land, and 4*l.* 19*s.* in part of land tax on tithes.”

The defendant, on the same day, distrained for the residue under a general warrant from the commissioners, who were also acting magistrates for the division. The warrant did not specify the property for which the distress was taken (*a*). A copy of the warrant had been applied for by plaintiff, and furnished by defendant. Defendant's counsel contended that the remedy was

(*a*) Stat. 38 G. 3. c. 5. (and see stat. 38 G. 3. c. 60. s. 1.) enacts, by s. 17., “That if any person shall refuse or neglect to pay any sum or sums of money wherest he or she shall be rated or assessed in *England*,” &c., “by this act, upon demand, by the said collector or collectors of that place, according to the precepts or estreats to him or them delivered by the said commissioners; that then, and in all and every such case and cases, it shall and may be lawful to and for the said collectors, or any of them, and they are hereby authorised and required, to levy the sum assessed by distress and sale of the goods and chattels of such person so neglecting or refusing to pay, or distrain upon the messuages lands, tenements, and premises, so charged with any such sum or sums of money, without any further authority from the commissioners for that purpose.” Chests, &c., may be broken open upon warrant under the hands and seals of any two commissioners. “And if any question or difference shall happen upon taking such distress, the same shall be determined and ended by the said commissioners, or any two or more of them.” The appeal clause, in the same statute, is sect. 8, which, after directing the appointment of assessors, and prescribing their duties, enacts that the commissioners shall give notice to the collectors, “at what time or times, place or places, the appeals of any person or persons, who shall think themselves aggrieved by being over-rated by the said assessors, may be heard and determined;” and “that all appeals once heard and determined by the said commissioners, or any three or more of them, or the major part of them then present, on the day or days by them appointed for hearing appeals as aforesaid, shall be final, without any further appeal, upon any pretence whatsoever.”

by

by appeal, if at all; and, further, that, under stat. 24 G. 2. c. 44. s. 6., the commissioners ought to have been joined in the action. The Lord Chief Baron was of opinion that the plaintiff was entitled to a verdict, which was found accordingly; but he reserved leave to move to enter a nonsuit if the commissioners ought to have been joined, under stat. 24 G. 2. c. 44. s. 6.

1840.

CHARLETON
against
ALWAY.

Ludlow Serjt., in *Michaelmas* term, 1838 (*November* 7th), moved for a new trial, on the ground that, the defendant not having appealed, the rate must be held good as against him, the question being merely as to excess, and the warrant general; and also for a nonsuit, on account of the non-joinder of the commissioners.

LORD DENMAN C. J. You may take a rule on the first point; but, as to the second, we do not think that the commissioners, acting merely as such, stand in the position of magistrates, so as to bring the case within stat. 24 G. 2. c. 44. s. 6.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule nisi for a new trial.

In this term (a),

R. V. Richards and *Greaves* shewed cause. The rate is general, and includes the part on which the tax has been redeemed, and as to which the commissioners had no jurisdiction. The general warrant on that is there-

(a) May 8th. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams* Js. Some points which were made, but which it was not necessary to decide upon, are not noticed in the report.

fore

1840.

CHARLETON
against
ALWAY.

fore bad: and replevin would lie; *Milward v. Caffin* (a). *Marshall v. Pitman* (b) does not interfere with the principle laid down in *Milward v. Caffin* (a), which is also affirmed in *Governors of Bristol Poor v. Wait* (c). If the distress be treated as made merely for the rectorial tithes, the claim as to the rest having been settled by the payment as explained by the receipt, then the distress is wholly bad, being made upon property not subject to the land tax. It may perhaps be contended that the general warrant is good, because it specifies no item, and rate was due on some property, whereas, in a warrant of distress for poor rate, the property occupied is specified. But under a warrant to search for stolen goods it would be illegal to take goods not stolen. Sect. 8, the appeal clause, of stat. 38 G. 3. c. 5. applies only where property subject to the rate has been overrated, not where a rate has been made upon property exempted from rate, and therefore not subject to the jurisdiction of the commissioners. Trespass therefore lies, as in *Williams v. Pritchard* (d), a case on the land tax, where the exemption was given by a special act, 7 G. 3. c. 37. s. 51. In *Eddington v. Borman* (e) trover was maintained for goods distrained under stat. 11 G. 3. c. 29. (for the drainage, &c., of the city of London), s. 74., where also the property was exempted by stat. 7 G. 3. c. 37. s. 51. By stat. 38 G. 3. c. 60. s. 74. the commissioners were bound to return the whole land tax originally charged on the parish, with a statement of the amount of it which was redeemed.

(a) 2 W. Bl. 1330.

(b) 9 Bing. 595.

(c) 1 A. & E. 264.

(d) 4 T. R. 2. See *Perchard v. Heywood*, 8 T. R. 468.

(e) 4 T. R. 4.

Ludlow Serjt. and W. J. Alexander, contra. In *Gibbs v. Stead* (a) it was held that the sum due for the quarter ending on *March 25th*, may be distrained for during that quarter; though the distress is bad if there have been no demand. Here the distress is made on 1st *January* 1838; and the sum due upon the then current quarter, for the vicarial tithes, will be larger than the sum claimed for the rectorial tithes. (*Greaves* pointed out that the sum due upon the current quarter had not been demanded.) As to the general question, the collector was bound to distrain if the commissioners had jurisdiction. Now, if the plaintiff had not occupied any land at all, the jurisdiction would have failed; but he is liable to the rate as an occupier of the vicarial tithes; and the only question is as to amount. That should have been tried by appeal, under sect. 8. The plaintiff not having appealed, it is as if he had appealed and failed. No warrant was necessary here under sect. 17 of stat. 38 G. 3. c. 5. Then a general warrant upon distinct claims is legal; and, even if one of them be objectionable, but be confirmed on appeal, the distress is good; *Patchett v. Bancroft* (b). It is not like a case where a distress is taken under different warrants, for specific sums, and some warrants are bad but others good, as in *Governors of Bristol Poor v. Wait* (c). The point as to the appeal was not raised in *Williams v. Pritchard* (d) or *Eddington v. Borman* (e). But *Marshall v. Pitman* (g) shews that, if there be any occupation of rateable property, to give jurisdiction, the remedy is by appeal. That

1840.

CHARLETON
against
ALWAY.

(a) 8 B. & C. 528.

(b) 7 T. R. 367.

(c) 1 A. & E. 264.

(d) 4 T. R. 2.

(e) 4 T. R. 4.

(g) 9 Bing. 595.

1840.

CHARLETON
against
ALWAY.

case is consistent with *Hutchins v. Chambers* (a) and *Durrant v. Boys* (b). Neither the assessment nor the warrant separates the rateable property from that which is not rateable.

Cler. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

The land tax on the rectorial tithes had in this case been redeemed: therefore neither the commissioners nor the assessors had any jurisdiction in respect of such land tax. It was, however, included in the assessment, but in one undivided sum with the land tax on the vicarial tithes, both being in the occupation of the plaintiff. This was incorrect, at all events, even if the rectorial tithes had not been redeemed, inasmuch as it appears that the bishop was proprietor of the rectorial tithes, and the plaintiff occupier only; and stat. 20 G. 3. c. 17. s. 3. provides that, "if any person" "shall rent, hold, or occupy messuages, lands, or tenements, belonging to different owners or proprietors, the same shall be separately and distinctly rated and assessed in such assessments, that the proportion of the land-tax to be paid by each separate owner or proprietor respectively may be known and ascertained." The want of separation was the fault of the assessors and commissioners: and, by stat. 5 & 6 W. 4. c. 20. s. 19, every "action or suit which shall be brought against any collector or collectors of the land tax shall be defended by the commissioners acting for the division or place where such collector or collectors shall have been appointed;" and

(a) 1 Bur. 573. 587.

(b) 6 T. R. 580.

the costs &c. shall be defrayed by an assessment as therein provided.

The plaintiff did, in fact, pay the land tax on the vicarial tithes; and the distress was really made for that on the rectorial tithes, 1*l.* 19*s.*, which was known to the collector to be disputed.

The only question is, whether the plaintiff ought to have appealed to the commissioners. We think that he was not bound to do so. Being assessed in respect of that which was not subject to the land tax, he had as much right to treat the assessment as a nullity as if it had been in respect of property not in his occupation; see *Governors of Bristol Poor v. Wait (a)*. The verdict therefore is right.

As to any attempt now to apply the distress to the land tax for the vicarial tithe of the current quarter, it is manifestly unjust and illegal; *that* land tax was never demanded, which it necessarily must be before a distress can be taken; and no appeal day was named with reference to that tax. The rule must be discharged.

Rule discharged.

(a) 1 A. & E. 264.

1840.

CHARLETON
against
ALWAY.

1840.

DOE on the several demises of PETER BOOLEY and WILLIAM JACKSON, of JOHN JONES and MARY his Wife, and of the said MARY JONES, *against* WILLIAM ROBERTS.

A., seized of lands in fee, devised (before 1st January 1838) as follows :

" I give and bequeath to *Mary*, my wife, all my lands, messuages, and tenements, by her freely to be possessed and enjoyed, with all my property whatsoever."

No mention was made of personalty in the will : nor did it appear whether the deviser had any.

Held, that the wife took a fee in the realty.

THIS was an action to recover a dwelling house with the appurtenances. By consent of parties, and by an order of Lord Denman C. J., the following case was stated for the opinion of the Court.

Robert Ithell, on 5th March 1812, being seized in fee of the said dwelling house, with the appurtenances, duly made and published his last will in writing, which was duly attested &c., and is as follows.

" I give and bequeath to *Mary*, my wife, all my lands, messuages, and tenements, by her freely to be possessed and enjoyed, with all my property whatsoever."

Robert Ithell, in or about the year 1815, died seized of the said dwelling house, with the appurtenances, and without having revoked or altered his said will, leaving his said wife, *Mary Ithell*, him surviving; who thereupon entered into possession and enjoyment of the said dwelling house, and so continued till the time of her death, which took place in September 1836.

The said *Mary Ithell* devised the said dwelling house, with the appurtenances, to the said *Mary Jones*, named in the said second and third demises; *Peter Booley* and *William Jackson*, the lessors of the plaintiff in the first demise, being the executors of the will of the said *Mary Ithell*.

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The question for the opinion of the Court was, what estate *Mary Ithell* took in the said dwelling house with the appurtenances, under the will of the said *Robert Ithell*. If the Court should be of opinion that she took a fee therein, then the defendant was to withdraw his plea, and judgment to be entered for the plaintiff by confession. If the Court should be of opinion that she took only a life estate, then judgment of nolle prosequi was to be entered for the defendant.

The case was argued in this term (a).

Tomlinson, for the plaintiff. Under this will, *Mary Ithell* took a fee simple. Had the words simply been, "all my property whatsoever," there could be no doubt that they gave a fee in the realty, and an absolute estate in the personalty; *Roe, lessee of Shell, v. Pattison* (b), *Nicholls v. Butcher* (c), *Patton v. Randall* (d). The principle of these decisions is, that it appears that the testator intends to give as full an estate in the realty as in the personalty, and the words carry an absolute estate in the personalty. Then, what is the effect here of the preceding words? Either they work nothing, or they are enlarged by the words "all my property whatsoever." The later words cannot be controlled by the earlier. In order to escape from the technical rule, which requires words of inheritance to pass a fee, the courts have occasionally given a double effect to the word "estate," applying it, not only to local description, but to amount of interest. Here, even if the word "property" were in itself applicable to local descrip-

1840.

DOX dem.
BOOLEY
against
ROBERTS.

(a) May 5th. Before Lord Denman C. J., *Littledale, Patteson, and Coleridge Js.*

(b) 16 *East*, 221.

(c) 18 *Ves.* 193.

(d) 1 *Ja. & W.* 189.

1840.

DOZ dem.
 BOOLEY
 against
 ROBERTS.

tion, for the purpose of contracting the effect of the devise, there is no locality apparent in the will to which the word can be applied. In *Hogan, lessee of Wallis, v. Jackson (a)*, a testator devised, "as to my worldly substance," interests both in lands and personalty, and then added a bequest to *A.* of "all the remainder and residue of all the effects both real and personal, which I shall die possessed of:" and it was held that this gave *A.* a fee in all the realty not otherwise disposed of. Lord *Mansfield's* judgment there fully supports the view for which the plaintiff here contends. In *Uthwatt v. Bryant (b)* the word "estate" was held to carry a fee, though the subject of devise had been denoted, in an earlier part of the will, by words implying merely local description. In *Roe dem. Allport v. Bacon (c)* a devise of all freehold lands, at *T., H.,* or elsewhere, and household goods, for life, and, after the death of the devisee for life, "all the said estates, goods, &c. to be divided among" certain persons, "share and share alike," was held to carry a fee. In that case there was much more ground than here for treating the word as a mere designation of the lands which were the subject of the devise. There, too, was an express bequest of personalty; so that, even if it be assumed that there was personalty in the present case, the authority goes beyond what is required for the plaintiff. In *Harding v. Gardner (d)* the words were, "I bequeath to my brother" "my freehold estate, consisting of thirty acres of land, more or less, with the dwelling house, and all erections on the said farm, situated at *Sudbury*;" and there the word "estate" was held to carry a fee, though it manifestly was used also to designate the

(a) 1 Cowp. 299.

(b) 6 Term. 317.

(c) 4 M. & S. 366,

(d) 1 Br. & B. 72.

particular

particular lands. [Lord *Denman* C. J. referred to *Doe dem. Wright v. Child* (a).] Cases may certainly be pointed out where the effect of the word has been contracted; but in those it will be found that there was some specific subject matter mentioned in the will to which the term "estate" could be applied. The general principle is to give the word its full effect unless something appear which requires it to be cut down. It may indeed apply to personalty; but that will not prevent it from applying also to realty, as in *Doe dem. Evans v. Evans* (b). [Coleridge J. The chief difficulty here is that we find in the will no word for personalty besides "property."] Lord *Mansfield* (c) points out the rule as to this; "It is now clearly settled, that the words 'all his estate,' will pass *every thing* a man has: But if the word 'all' is coupled with the word 'personal' or a *local description*, there, the gift will pass only personalty, or the specific estate particularly described." No executor is named in this will; the deviser's intent probably was that, if he should leave any personalty, that should go absolutely to his wife as well as the realty. [Coleridge J. Suppose the words had been "with all my personal property whatsoever?"] That might bring the case within Lord *Mansfield's* rule, and prevent the word "property" from applying to the realty at all. Nothing, in such case, would shew an inheritance, except an intendment, which could not be made against the heir, that an equal interest was given in the personalty and realty. The only object of the deviser's bounty here is the wife; no one else is mentioned.

(a) 1 *New. R.* 335.: see *Doe dem. Child v. Wright*, 8 *T. R.* 64.; *Roe dem. Child v. Wright*, 7 *East*, 259.

(b) 9 *A. & E.* 719.

(c) In *Hogan, lessee of Wallis, v. Jackson*, 1 *Cowp.* 306.

1840.

DOE dem.
BOOLEY
against
ROBERTS

1840.

—
Dox dem.
Booley
against
Roberts.

Peacock contra. It must be admitted that the words "all my property whatsoever" would carry the fee in the realty unless they were controuled by the context. It will be granted also on the other side that the words which precede would not carry the fee. The words "freely to be possessed and enjoyed" would not give the inheritance; *Goodright dem. Drewry v. Barron* (a). Then the question is whether it was the intention of the testator to enlarge their effect by what follows. In 2 *Powell on Devises*, p. 5. (3d edit., by *Jarman*), it is said, "That the heir is not to be disinherited without an express devise, or necessary implication; such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed." Now in this devise the concluding words are joined to the preceding by the word "with." The obvious meaning is that the realty was to be enjoyed for life, together with all the personalty. Whether the devisor had personalty at the time of making the will is not material: he contemplated the possibility that there might be some when the will should take effect. Some subject matter must have been meant which was not realty: for the previous words would include all the realty. In *Roe, lessee of Shell, v. Pattison* (b) there was nothing, as here, shewing that "property" was applicable to personalty; but such an application was excluded by the word "freehold." In *Hogan, lessee of Wallis, v. Jackson* (c) there was a specific devise to M. of lands in B. for life, before the general words; and the principal question appears to have been whether the general words gave M. a fee in the residue.

(a) 11 *East*, 220.(b) 16 *East*, 221.(c) 1 *Cowp.* 299.

It cannot be said, here, that "all my property" refers to lands undisposed of; for all lands are previously disposed of: nor can the words refer to an undisposed of interest in the same land; for the devise is to the same person. In *Nicholls v. Butcher* (a), *Patton v. Randall* (b), *Roe dem. Allport v. Bacon* (c), and *Harding v. Gardner* (d), there was nothing in the context to restrain the general words. In *Uthwatt v. Bryant* (e), though the word "estate" had been used in an earlier part of the will with reference to particular lands, the person in favour of whom the earlier devise was made was different from the person who was the object of the later words. In *Doe dem. Evans v. Evans* (g) it was clear that, if the words referred to real property at all, they carried a fee. In *Chapman v. Prickett* (h) the words "all shares or property whereof I may be possessed or entitled to," preceded by the words "freehold messuages in" &c., "stock or shares in any of the public funds, and all money in hand, or debts due to me," were held not to pass copyhold. A devise of "lands" does not give a fee without other words; *Doe dem. Norris v. Tucker* (i). In *Doe dem. Hickman v. Haslewood* (k) this Court adopts the language of *Dallas C. J.* in *Doe dem. Penwarden v. Gilbert* (l), that "every case of this sort depends on its own peculiar circumstances."

Tomlinson, in reply. *Doe dem. Norris v. Tucker* (i) falls within the class of exceptions already pointed out:

(a) 18 Ves. 193.

(c) 4 M. & S. 366.

(e) 6 Taunt. 317.

(h) 6 Bing. 602.

(k) 6 A. & E. 167. 173.

(b) 1 Ja. & W. 189.

(d) 1 Br. & B. 72.

(g) 9 A. & E. 719.

(i) 3 B. & Ad. 473.

(l) 3 Br. & B. 85. 88.

1840.

—
Doe dem.
Booley
against
Roberts.

the

1840.

—
Dox dem.
Booley
against
Roberts.



the words were, "all the above bequeathed lands;" and the land before bequeathed was "my freehold estate called *Pouncetts*:" the word "lands" was therefore restricted to local description. But there Lord *Tenterden* recognised the principle of laying hold of any matter which would enlarge the life estate. It is said that here was a previous mention of lands: but that was also the case in *Patton v. Randall* (a). It is asked how the earlier words, giving only a life estate, are enlarged: but that difficulty exists only where the early words expressly confine the interest to a life estate. Formerly an inheritance was sometimes given by limiting merely to *A.*, with an habendum to *A.* and his heirs; *Sheppard's Touchstone*, p. 76.: but even this, according to the argument on the other side, would not have carried more than a life estate. The plaintiff does not insist on the words "freely to be possessed and enjoyed:" they neither contract nor enlarge the other words. [*Littledale J.* referred to *Ridout v. Pain* (b).]

Cur. adv. vult.

Lord DENMAN C. J., in this term (*May* 12th), delivered the judgment of the Court.

It is by no means enough to say that we have not been able to read this will without full conviction that the testator intended to give his wife a fee in the lands; because many Judges have said the same of devises which they have notwithstanding construed as estates for life. But we draw our conclusion from the peculiar language. The "lands, messuages, and tenements" are to be, by *Mary* his wife, "freely possessed and en-

(a) 1 *Ja.* & *W.* 189.

(b) 3 *Att.* 486. *S. C.* 1 *Ver.* 10.

joyed,

joyed, with all" the testator's "property whatsoever." The case does not, indeed, find that the testator had any personalty: and, however impossible that a man possessed of some lands and tenements should be wholly without it, we perhaps ought not to infer the fact from the probability, however great. But he plainly thought that he might die possessed of personalty; and, in case he should, meant to give it exactly in the same manner and for the same interest as the lands and houses. This appears to the Court a full indication that he gave both in perpetuity; and a decision to this effect leaves all the cases untouched.

The widow, therefore, had an estate in fee; and the plaintiff is entitled to our judgment.

Judgment for plaintiff (a).

(a) As to wills made on or after 1st January 1838, see stat. 7 W. 4. & 1 Vict. c. 26. ss. 28, 34.

1840.

—
Doe dem.
Booley
against
Roberts.

1840.

**MATTHEW CULLEY against DOE on the demise
of JOHN TAYLERSON.**

(Error from the Court of Pleas, *Durham*).

In 1799, *D.*, *M.*, and *A.* being entitled to a remainder in fee, as tenants in common, of lands then held by a tenant for life, *D.* and the tenant for life conveyed the third, in which *D.* had the remainder, to *C.*, who thereupon entered into possession of the whole. In 1800 the tenant for life died, *A.* having died before. The heir at law of *A.* filed a bill in Chancery, in respect of the land, against *C.* In 1835,

THIS case was argued in last *Trinity* term (a), by *W. H. Watson* for the plaintiff in error, and *Granger* for the defendant in error. The judgment will fully explain the nature of the case and the arguments used.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*May* 12th), delivered the judgment of the Court.

This was an ejectment, brought on the demise of *John Taylerson* against *Matthew Culley*, to recover the possession of two several undivided third parts of one undivided fourth part of certain premises in the parish of *Gainford* in the county of *Durham*.

The cause came on to be tried before our Brother

while the proceedings were going on, the said heir at law died, having devised to *J.* all his lands &c., whether in his own possession or that of others, as far as he lawfully could, specifying those which he was seeking to recover from *C.* In 1836, the devisor's heir at law brought ejectment against *C.* for *A.*'s third part.

Held that, under sects. 2 and 12 of stat. 3 & 4 *W. 4. c. 27.*, the defendant's possession could not be held to have been ever that of the other tenants in common; for that sect. 12 made the possessions of tenants in common separate from the commencement of the tenancy in common, and not merely from the time of the act passing.

That, therefore, sect. 2 would have barred the lessor of the plaintiff; but

That his right was saved by sect. 15, the ejectment having been brought within five years of the passing of the act, and the possession of *C.* not being adverse to the other tenants in common within the meaning of that section.

But that the devise of 1835 (though made before sect. 3 of stat. 7 *W. 4. & 1 Vict. c. 26.* came into operation), defeated the claim of the lessor of the plaintiff as heir at law to the devisor. For that the devisor's right was more than such a mere right of entry as was then not devisable, he having never been diseised, and having a right which enabled him to devise, both before and since stat. 3 & 4 *W. 4. c. 27. ss. 2, 12, 15.*

In error on a bill of exceptions, the record stated the exceptions to have been made after the verdict was found. The Court (upon the statement of the Judge who tried the cause, and the admission of counsel) amended the record in this respect.

(a) *May* 28th, 1839. Before Lord Denman C. J., *Littledale*, *Patterson*, and *Williams* Js.

Patterson,

Patteson, at the Spring assizes for the county of *Durham*, in 1837, when the jury found a verdict for the plaintiff as to one undivided third part of one undivided fourth part, and for the defendant as to the other undivided third part of an undivided fourth part (*a*).

The case now comes here on a writ of error from the Court of Pleas at *Durham*, on a bill of exceptions proposed by the defendant to the Judge, in respect of the opinion delivered by him to the jury on the trial of the cause.

It appeared by the evidence that, in the year 1757, *William Hodgson*, seized in fee of the entirety of the premises, by his will, dated 24th November 1757, devised to his daughter *Ann Howden* one undivided fourth part thereof for her life, with remainder to all her sons and daughters, and their respective heirs, to take as tenants in common; to his daughter, *Elizabeth Colpitts*, one other undivided fourth part; to his daughter, *Margaret Taylerson*, one other undivided fourth part; and to his daughter, *Mary Middleton*, the remaining undivided fourth part; to each of them respectively for her life, with remainder to all the sons and daughters of each, and their respective heirs, to take as tenants in common.

The testator, *William Hodgson*, died in 1764, without altering his will, leaving his said four daughters mentioned in the will surviving him. All the four daughters were married, and they all had issue. *Margaret Taylerson* the daughter had issue, *Daniel*, her only son, and *Margaret* and *Ann*, her daughters.

In the month of June 1799, *Matthew Culley* and

(a) The share in respect of which the plaintiff recovered was the third part which the lessor of the plaintiff claimed through *Ann Taylerson*; and he failed to make out a title through *Margaret Taylerson*.

1840.

CULLEY
against
DOE dem.
TAYLERSON.

In

1840.

—
 CULLEY
 against
 DOX dem.
 TAYLERSON.

George Culley, under whom the defendant claims, entered into a contract with several persons claiming under the will of *William Hodgson*, for the purchase of their respective shares and interests in the estate in question: and, by indentures of lease and release of the 18th and 19th of *June* 1799, all the persons then alive who were entitled under the will of *William Hodgson*, except *Margaret* and *Ann*, the two daughters of *Margaret Taylerson* (and also with the exception of *Robert Colpitts*, one of the sons of the said *Elizabeth Colpitts*), conveyed the whole of their respective shares and interests in the premises to *Matthew Culley* and *George Culley*, except only two third parts of the said *Margaret Taylerson*, the testator's daughter's, fourth part of the premises: and which said two third parts, after the death of the said *Margaret Taylerson*, it is in the said indenture of release expressed, belonged to the said daughters *Margaret* and *Ann*, and their respective heirs. This part of the release, it rather appears, is not very correctly worded, unless there be a mistake in the copy in the paper book in error. It should seem, however, that *Margaret Taylerson*, the mother, did not convey her life estate in these two third parts of the undivided fourth part. A fine was levied of the premises conveyed, in the Court of Pleas at *Durham*, in pursuance of a covenant in the indenture of release. The purchase was, in fact, made for the benefit of *Matthew Culley*, who, after the purchase, entered into the possession of the whole of the premises devised by the will of *William Hodgson*, both of the parts conveyed by the lease and release, and also of the two thirds of one fourth share before mentioned. The bill in Chancery (*a*), and also

(a) See post, p. 1012.

the answer, only state that he entered into the parts conveyed by the lease and release: but, in fact, he also entered upon the two thirds of the fourth share.

Some time afterwards, but at what time it did not appear, the said *Robert Colpitts*, one of the children of *Elizabeth Colpitts*, made some disposition of his interest to *Matthew Culley*. *Matthew Culley* afterwards died: and the premises mentioned in the deeds of lease and release descended to his son *Matthew Culley*, who afterwards sold them to *George Culley*, who, by his will, devised them to *Matthew Culley*, the defendant, who is now in possession of them.

Margaret Taylerson, the mother, one of the daughters of *William Hodgson*, died in *September 1800*; and *John*, the husband of *Margaret Taylerson*, the grandfather of the lessor of the plaintiff, died in *January 1801*. *Margaret Taylerson*, the daughter of *Margaret* the mother, intermarried with one *Robinson*, and, in 1784, went with her husband to *America*, and is since dead, having survived her husband, and (as *Daniel Taylerson*, her brother, the father of the lessor of the plaintiff, alleged) died without issue; or, if she had any, they died without issue: but that appeared uncertain. And he claimed to be heir at law to her or her children, of one undivided third part of one undivided fourth part.

Ann Taylerson, the other daughter of *Margaret* the mother, died some time ago, but it is uncertain when, without having been married: and *Daniel Taylerson*, her brother, the father of the lessor of the plaintiff, claimed to be her heir at law.

Daniel Taylerson, by his will, dated the 21st day of *January 1835*, executed so as to pass real estates, devised all his messuages, lands, tenements, and hereditaments,

1840.

CULLEY
against
Dox dem.
TAYLERSON.

1840.

—
CULLEY
against
Dor dem.
TAYLORSON.

ments, and parts and shares of messuages, lands, tenements, and hereditaments, whether in his own possession or that of others, and also (as far as he lawfully could) to which he was entitled, and which he was then seeking to recover possession of from *Matthew Culley*, the defendant, to *George Jackson*, his heirs and assigns, for ever. He died on the 5th of *February* 1835, leaving the lessor of the plaintiff, *John Taylerson*, his eldest son and heir at law. *George Jackson*, the devisee, is still alive. *Daniel Taylerson*, in his lifetime, filed a bill in Chancery against the defendant, *Matthew Culley*, in respect of the matters aforesaid, and to which bill the defendant *Matthew Culley* put in an answer.

This ejectment was brought on the 17th day of *August*, in the year 1836. This is the date at the heading of the declaration in the issue; but probably the ejectment was brought before: it does not seem material to have the exact day.

This was the evidence on both sides. And upon the case being thus closed, the counsel for the defendant insisted and contended that all the estate, right, title, and interest of the said *Daniel Taylerson*, of and in the said premises, by force of his said will, passed to the said *George Jackson*, and did not descend to the said *John Taylerson*. Thereupon the said Judge declared, and delivered his opinion to the jury, that the said premises belonged to the defendant, and those under whom he claimed, as tenants in common with *Daniel Taylerson* in his lifetime, and *John Taylerson* since his death; and that the possession of the defendant was not adverse to the said *Daniel Taylerson* at the time of the passing of the act of parliament passed in the 3 & 4 *W. 4.*, and thereupon

thereupon the plaintiff had a right to bring his action, and to recover the premises at any time within five years after the passing of the said act: and that the said action would lie, although, at the time when the said act was passed, *Daniel Taylerson* was a tenant in common, without any proof in the said action of any actual ouster of *Daniel Taylerson* or *John Taylerson* from the aforesaid premises. And the said Judge did also declare, and give his opinion to the jury, that the interest of *Daniel Taylerson*, the father of *John Taylerson*, by the operation of, and since, the said act of parliament, had become a right of entry or action only, and could not be devised by his will: that he could not pass his claims by will, and it did not prevent his son from bringing the said action: "and with that direction left the same to the jury aforesaid. And thereupon the said jury then gave their verdict for the plaintiff, with 1s. damages. Whereupon (a) the counsel for the defendant did then and there except to the said opinion of the said justice, and insisted" that the plaintiff was barred

1840.

CULLEY
against
Doe dem.
TAYLERSON.

(a) A preliminary objection was taken for the defendant in error by *Granger*, who contended that the exceptions appeared not to have been tendered till after verdict. He referred to *Armstrong v. Lewis*, 2 C. & M. 274.; and pointed out that the record was properly made up, in this respect, in *Wright v. Doe dem. Tatham*, 1 A. & E. 3. He admitted (as *Patteson J.* had stated) that, in fact, the exceptions were tendered before verdict; but he contended that the record was conclusive, and that, after the bill was sealed, no alteration as to facts could be introduced by amendment; as to which, he referred to *Bridgman v. Holt, Shower's Par. Ca.* 122, 3.

W. H. Watson, contra, contended that the order was immaterial: but that, at any rate, the record might be amended: and he referred to *Richardson v. Mellish*, 3 Bing. 334.; *Doe dem. Church v. Perkins*, 3 T. R. 749.

Per Curiam. We think the amendment may be made.

VOL. XI.

3 X

by

1840.
 ———
 CULLEY
 against
 Doe dem.
 TAYLORSON.

by not proving possession of the premises within twenty years before the commencement of the said action; and that the plaintiff was not entitled to recover his term without proving that *Daniel Taylerson* or *John Taylerson* had been ousted by the defendant from the aforesaid premises. And the counsel for the defendant also excepted to the said opinion of the said Judge, and insisted that nothing descended to the said *John Taylerson*, as the heir at law to the said *Daniel Taylerson*; but that all the right, title, and interest of the said *Daniel Taylerson*, of and in the said premises, passed by the said will of the said *Daniel Taylerson* to the said *George Jackson*.

And it is upon the opinion of the Judge, thus expressed in the bill of exceptions, and upon the exception to that opinion, that we are called upon to give judgment.

And we shall first consider how the case of the lessor of the plaintiff would stand at the common law, if there had been no devise of *Daniel Taylerson* to *George Jackson*. Generally speaking, one tenant in common cannot maintain an ejectment against another tenant in common, because the possession of one tenant in common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant in common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster: as to which see the cases of *Doe dem. Fishar v. Prosser* (a), *Doe dem.*

(a) 1 Comp. 217.

Hellings v. Bird (a), and *Doe dem. White v. Cuff* (b).

1840.

And, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for an entirety. And so also, if the consent rule admits an ouster as well as the lease to, and entry of, the nominal plaintiff, this admission in the consent rule will prevent the defendant from setting up that he is tenant in common with the lessor of the plaintiff; and then also the title of the lessor of the plaintiff to enter will alone be to be decided.

CULLEY
against
DOE dem.
TAYLORSON.

The second section of stat. 3 & 4 W. 4. c. 27. enacts, that, "after the thirty-first day of *December* one thousand eight hundred and thirty-three no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same." The effect of this section is to put an end to all questions and discussions, whether the possession of lands, &c., be adverse or not; and, if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section.

Then, to consider the effect of this section as to tenants in common.

(a) 11 *East*, 49.

(b) 1 *Campb.* 173.

1840.
 ———
 CULLEY
 against
 Doe dem.
 TAYLORSON.

If this had been the only parliamentary enactment, it would not have varied the right of one tenant in common from what it was at the common law, because, the possession of one tenant in common being the possession of the other tenant in common, the lessor of the plaintiff and the defendant were, in contemplation of law, in possession; and there would be no such thing as the lessor of the plaintiff either entering or having a right of entry, an entry or a right of entry into land supposing that the party is out of possession, but which is not the case of tenants in common, where all are in possession; and, therefore, the second section would not apply to tenants in common, but their rights would be to be determined by the rules of the common law. And the same questions as to an ouster being presumed, or as to the effect of the consent rule in ejectment confessing an ouster, would arise (a). In the present case it does not appear, upon the record transmitted into this Court, that any question was put to the jury as to presuming an ouster after a possession of upwards of thirty years; nor does it appear in evidence that there was any, nor, if any, what, consent rule, so as to see whether any effect could be produced by the admission of ouster in the consent rule.

We will now consider the effect of the twelfth section of the act, which applies to coparceners, joint tenants, and tenants in common. By that section it is enacted, "that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in

(a) On this point, the judgments of *Littleale* and *Patterson J.*, in *Doe dem. Jones v. Williams*, 5 A. & E. 291., were referred to for the defendant in error.

possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

The first question arising upon this clause is, whether it extends to make the possession of coparceners, joint tenants, or tenants in common, separate possessions from the time when the act came into operation, or whether it has a relation back to all coparceners, joint tenants, and tenants in common, who have ever been such, from the first time of their being coparceners, joint tenants, and tenants in common. If it is confined to make their possession separate only from the time of the act coming into operation, then it would not affect the present case, because the lessor of the plaintiff would only have a separate possession for a few years before the ejectment, and his right to recover would be what it was at common law, and, as we have before said, upon the second section of the act. But we are of opinion that, from the language of the act, it has a relation back, at least as far as relates to the object of this act, and has the effect of making their possessions separate from the time when they first became coparceners, joint tenants, or tenants in common. Then, applying that to the present case, the possession of the lessor of the plaintiff, and of those under whom he claims, was in point of law a separate possession from that of the defendant, and of those under whom he claims, from the month of

1840.

CULLEY
against
Doe dem.
TAYLORSON.

1840.
—
CULLEY
against
DOR dem.
TAYLORSON.

June 1799, and therefore above thirty years before the ejectment was brought. And, that being so, the persons under whom the lessors of the plaintiff claimed first had a right of entry as far back as 1799: and, consequently, are barred by the second section of the act.

But we must now consider the effect of the fifteenth section.

By that section, it is enacted, "that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act."

If, therefore, in the present case, the possession of *Culley* was not adverse to that of *Taylorson* at the time of passing the act, *Taylorson* would have five years after the passing the act in which he might bring his ejectment, and which five years had not expired when the ejectment was brought. Then, was his possession adverse to that of *Taylorson*? He and his ancestors had been out of the participation of the rents and profits for above twenty years; and, in ordinary cases, it would be to be left to the jury, whether they would presume an ouster. In the present case, it appears, by the bill of exceptions, that the Judge stated that the possession was not adverse; and the exceptions taken to the Judge's

Judge's direction do not point to any objection made to this opinion as expressed by the Judge; nor was he required to leave that fact to the jury. Indeed the omission, from the conveyance of 1799, of the two undivided shares of the one fourth part in question shews that the possession of *Matthew Culley*, to whom the rest of the shares were conveyed, could not be considered as adverse to the possession of *Margaret Taylerson*, the mother, or of her daughters after her death. Then the lessor of the plaintiff had five years after the passing the act to bring his ejectment; and he has brought it within that time.

It appears, then, that the second section alone would leave him as he was at the common law; that by the second and twelfth together he is barred; but that by the second, twelfth, and fifteenth, taken together, he is restored to his right to recover.

But there is another objection to the right of the lessor of the plaintiff arising on the bill of exceptions, that *Daniel Taylerson* had, on the 21st January 1835, devised his interest in these shares to *George Jackson*, his heirs and assigns, for ever; and that, therefore, the lessor of the plaintiff had not the legal estate. But the defendant in answer says that this is a devise of a mere right of entry; and that such right of entry is not devisable at law.

We may here notice that, by the late statute, 7 W. 4. & 1 Vict. c. 26., the latter part of section 3 enables persons to devise rights of entry for condition broken, and all other rights of entry; but, this act having been passed since the devise of *Daniel Taylerson*, that devise is not in any way affected by the act.

1840.

—
CULLEY
against
Dox dem.
TAYLERSON.

1840.
 ———
 CULLY
 against
 Doe dem.
 TAYLORSON.

The case of *Goodright dem. Fowler v. Forrester* (a), in the Court of King's Bench, and affirmed in error in the Exchequer Chamber (b), is cited in support of that opinion, that a right of entry is not deviseable. In the case in the King's Bench, it was so held: but, in the Exchequer chamber, the case went off upon another point: and Lord Chief Justice *Mansfield*, in giving the judgment of the Court, expresses something like a doubt about a right of entry not being deviseable. But, considering that the judgment of the King's Bench has never been reversed, and considering also the arguments brought forward in these Courts in support of that opinion, we do not feel ourselves authorised to depart from it. And, as all the learning which could be collected on the subject was brought forward in the discussion in the two Courts, we do not think it necessary to enter into a detail of them. The same opinion, that a right of entry was not deviseable, was expressed by Lord *Eldon* in *Attorney General v. Vigar* (c). And in the case of *Doe dem. Souter v. Hull* (d) Lord Chief Justice *Abbott* and Mr. Justice *Bayley* express the same opinion.

It will then be proper to consider, whether the interest which *Daniel Taylerson* had, was what the law considers such a right of entry as is not deviseable.

In the authorities cited in the judgment of the Court, and in the arguments adduced by the counsel in *Goodright dem. Fowler v. Forrester* (e), they are rights of

(a) 8 East, 552. On this point, *Jones v. Roe, lessee of Perry*, 3 T. R. 88., was cited for the plaintiff in error.

(b) *Goodright dem. Fowler v. Forrester*, 1 Term. 578.

(c) 8 Cox. 256. 282.

(d) 3 Dow. & Ry. 38.

(e) 8 East, 552.; 1 Term. 578.

entry which arose from the freehold estate of the party being divested, either by fine or recovery, or by disseisin, or by discontinuance which is a species of disseisin, or by some other tortious act, which ousts him of the freehold, and where it is necessary to make an actual entry on the land to make his title or interest available, and to restore his seisin. But, suppose he is merely dispossessed, without his seisin of freehold being taken from him, or if the possession only be withheld from him, there is no necessity to make an entry on the land. Suppose tenant in fee demises for twenty one years, and, after the expiration of the term, the tenant retains the possession without paying rent or acknowledging the title of the landlord, and, after the expiration of the lease, the owner devises the estate, it may be said, in common parlance, that the owner had a right of entry, and therefore could not devise it: but there is no doubt but that he might devise it; for this withholding the possession by the tenant for years is not a disseisin; and the right which the owner has is not what the law, in considering these subjects, calls a right of entry, so as to make it necessary for the owner to re-enter on the land to get possession of his estate; for to make that necessary there must be a tortious ouster of the freehold.

In order to see whether *Daniel Taylerson* had a right to make the will in question, it is necessary to consider how it would have been at common law, and how far, if he had such right, it would be affected by the statute of limitations of 3 & 4 W. 4. c. 27.

At common law, *Daniel Taylerson* had a primâ facie right to devise his interest, inasmuch as tenants in common have the same right, under the statute 34 &

35 H. 8.

1840.

—
CULLEY
against
DOR dem.
TAYLERTON.

1840.

CULLEY
against
DOE dem.
TAYLORSON.

§ 5 *H. 8. c. 5.*, as persons legally seised. And, as his possession, and those under whom he claims, was also the possession of the *Culley* family, there was nothing to prevent his devising the estate, but that, after being out of the participation of the receipt of the rents and profits of the estate for above thirty years, an ouster might be presumed. But length of time alone is not an ouster, till so found by the jury; and, as there has been none found, we could not intend it.

But suppose an ouster had been found: unless by that it was meant that a disseisin or other tortious ouster of the freehold had taken place, it would not reduce it to an undevisable right of entry.

A fine was levied in 1799: but that could have no effect, as it was only of the premises conveyed by the lease and release of 1799, which these shares were not.

In the case of *Doe dem. Souter v. Hull (a)*, above cited, *Henry Souter* devised to his wife for life; and his widow and younger son, without the privity of the eldest son of *H. S.*, conveyed in fee to *C. H.*, who continued in the undisturbed possession for twenty two years, and died possessed, leaving it to his children. Sixteen years after *C. H.* entered into possession, *Whicher Souter*, eldest son and heir at law of *H. S.*, made his will, and devised his estate to trustees, and died three years afterwards without disturbing the possession of *C. H.* It was objected that the trustees could not recover after the quiet possession of *H.* for twenty two years. Lord Chief Justice *Abbott* said, there was no ground for saying that the adverse possession of *C. H.* had operated as a

(a) 2 *Dow. & R.* 38.

disseisin of Mr. *Souter*. He said *C. H.* "did not take possession wrongfully, he only wrongfully continued in possession. He came in under right and title, which remained good under the life estate of *Henry Souter's* widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance to *Whicher Souter*, who permitted him for a period to remain in possession." He afterwards said, "I know of no authority which says, that a mere wrongful possession divests the estate of the party against whom the possession is adversely held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment." Mr. Justice *Bayley* said, "In order to bar the power of devising a right of entry, there must be an actual disseisin of the devisor; a mere adverse possession will not suffice; he must be completely ousted of the freehold;" which, he said, the devisor was not: and he considered *C. H.* as a tenant at sufferance. And he afterwards adds, "It is said, that there has been an adverse possession for twenty-two years in this case. I know of no case in which it has been held, that a mere adverse possession (if this case is so put,) can operate as a disseisin, to prevent the owner of the freehold from devising it by will;" and then he goes on to state that *C. H.* could only be a disseisor in one way, at the election of the owner of the freehold and inheritance (*a*).

In that case, *C. H.* came rightfully into possession, upon which some stress is laid by both the Judges. In

(*a*) On this point, *Doe dem. Burrell v. Perkins*, 3 M. & S. 271., was referred to for the plaintiff in error. See note on *Watkins's Principles of Conveyancing*, p. 25. (8th ed.).

1840.

CULLEY
against
Doe dem.
TAYLORSON.

the

1840.

—
 CULLEY
 against
 Doe dem.
 TAYLERTON.

the present case, it does not appear very distinctly whether *Margaret Taylerson*, the mother, conveyed the whole of her life interest in the fourth undivided part of the premises, or whether her life interest in two shares out of three was left out of the conveyance, as well as the interest in remainder of her two daughters. The release does not appear to be very accurately set out in the bill of exceptions: but it rather appears as if *Margaret Taylerson*, the mother, did not convey her life interest in these two third shares which belonged to her daughters after her death. And therefore the case now under our consideration would not have the benefit of the remark, that *Culley* originally entered rightfully into the possession of these two shares.

The dates of the facts which took place in this case of *Doe dem. Souter v. Hull* (a) are not very distinctly stated: and it is not quite clear whether the twenty two years of *H.*'s possession was the whole time he held the estate, or whether it was twenty two years after the death of the tenant for life. It would rather appear to be twenty two years after the death of the tenant for life. Nor does it appear whether the heir at law made his will during the life of the tenant for life, or after her death. But we cite the case more particularly for the expressions used by the Judges, and particularly by Mr. Justice *Bayley*, as to devising a right of entry.

And we think, upon the whole, that at common law this right of *Daniel Taylerson* was devisable.

Then, as to the statute of 3 & 4 W. 4. c. 27. Upon the second section we think it would have been the same as at common law; and the same reasoning would

(a) 2 D. & R. 38.

apply

apply as in the earlier part of our judgment upon this statute. Then, as to the twelfth section. The will was made after the statute came into operation; but we have already said that we consider it as having a retrospective operation; and then, for the purposes of this act, *Daniel Taylerson* and those under whom he claimed would have been out of possession above thirty years, and therefore barred by the second section from making any claim to the land: and consequently no question as to a right of entry could arise, about a right of entry being deviseable or not, as he would have ceased to have any sort of right to the land for any purposes whatever. Next we must inquire into the effect of the fifteenth section. We have before stated that, as the possession of *Culley* was not adverse to that of *Taylerson* at the time of passing the act, he had a right to bring an ejectment within five years; and he would also have a right to make an entry or distress: and we think that section gives him all the rights which the owner of an estate not in the actual occupation has.

It is true, that, at the time he made his will, he was solely seized of these two shares: but nothing had actually occurred, in fact, to create a disseisin of his freehold, or to divest his estate, so as to turn it into a mere right of entry. And we think there is nothing in the act which has the effect of operating upon the facts of the case, to make them amount to a disseisin, or divesting the freehold so as to prevent *Daniel Taylerson* from devising the estate (a). The act has no language or expressions which seem to point at such a conclusion being drawn: it is an act as to limitation of time, op-

1840.

CULLEY
against
Doe dem.
TAYLERSON.

(a) On this point, *Nepean v. Doe dem. Knight*, 2 M. & W. 894. 911., was cited for the plaintiff in error.

1840.

—
 CULLEY
against
 DOE dem.
 TAYLORSON.

rating only upon the possession of parties : and, as to joint tenants, coparceners, and tenants in common, making their joint possession to be several. The expression *where the possession is not adverse* is quite contrary and inconsistent with there being a disseisin of freehold, or divesting the freehold estate of the party : and, when it says the party may make an entry or distress, or bring an action, it appears to give the owner all the powers that can be given when the possession is not adverse, but the actual possession or occupation is withheld from him.

This devise, then, of *Daniel Taylerson* to *George Jackson* will have the effect of barring the title of the lessor of the plaintiff : and, on this ground, we think that the judgment of the Court of Pleas at *Durham* must be reversed, and that judgment should be entered for the plaintiff in error.

Judgment reversed.

Wednesday,
 May 13th.

The QUEEN *against* THOROGOOD.

DOE, on the several demises of HARTWRIGHT
 and others, *against* FEREDAY.

THE reports of these cases will be found in Volume XII.

END OF EASTER TERM.

1840.

EASTER VACATION (a).

SHEERMAN *against* THOMPSON.*Thursday,*
May 14th.

ASSUMPSIT by drawer against acceptor of a bill of exchange for 17*l.*, drawn 25th *August* 1838, payable to plaintiff's order three months after date.

Plea, that before the commencement of the suit, and before defendant's discharge thereafter mentioned, defendant, being indebted to plaintiff in 11*l.* 14*s.* 6*d.*, drew a bill of exchange on *B. N.* for that amount, payable to defendant's order, which was accepted by *B. N.*, and indorsed to plaintiff, who received it on account of his said debt; that defendant was afterwards, towit on 27th *October* 1837, duly discharged by an order of the court for relief of insolvent debtors, under stat. 7 *G. 4. c. 57.*, of and from the said debt, and of and from all liability in respect of the last-mentioned bill, except as in the said act mentioned, which order was still in force; that afterwards, towit, on 25th *August* 1838, an account was taken between plaintiff and defendant of and concerning the said last-mentioned debt and bill, and of and concerning 11*s.* for interest thereon, and "of and concerning a certain other sum, towit, 6*l.* 10*s.*, then alleged by the plaintiff to be due to him from the defendant for goods before then sold and delivered by the plaintiff to the defendant at his request;" that upon such account, the same not being of and concerning any other demand than the above against defendant, defendant was found

The drawer of a bill of exchange, accepted by defendant for a sum consisting partly of a debt from which he had been discharged under the Insolvent Debtors' Act, 7 *G. 4. c. 57.*, and partly of a new debt, is entitled to recover on the bill as to amount of the new debt: Therefore a plea of discharge under sect. 61 of that act, as to the old debt, is no answer to the whole of a count on such a bill.

(a) The Court sat in Banc, under stat. 1 & 2 *Vict. c. 32.*, on *Thursday* the 14th of *May*. The Judges were Lord *Denman C. J.*, *Littledale* and *Coleridge Js.*

indebted

1840.

SHEERMAN
against
THOMPSON.

indebted to plaintiff in 18L 15s. 6d., which sum was made up of the three sums above-mentioned, and of no other consideration whatever. Averment, that the sum so found due was the consideration for the acceptance of the bill mentioned in the declaration, and that defendant accepted it for and in respect of the same debt, from part of which he had been so discharged as aforesaid, and that there never was, at any time, any value or consideration for his acceptance or for his payment of the amount of the bill, or any part thereof, except as aforesaid. Verification.

Demurrer, assigning for causes, that it did not appear by the plea whether the sum of 6L 10s. mentioned in it as part of the consideration was due from defendant before or at the time of his discharge; or that it was a demand for goods sold by plaintiff to defendant before his discharge; or that defendant was discharged from it; that the right of action in respect of that sum on the bill was not denied, nor confessed and avoided in the plea; that the plea was improperly pleaded to the whole of the count, though a defence only to part &c. Joinder.

Creasy, for the plaintiff. The plea goes only to shew that there is no consideration for part of the sum included in the bill. As to the rest, the declaration is good, and the jury may apportion the amount; *Darnell v. Williams* (a), *Barber v. Backhouse* (b). Sect. 61 (c) of stat.

7 G. 4.

(a) 2 Stark. N. P. C. 166.

(b) 1 Peake, N. P. C. 61. (86. of 3d. ed.).

(c) The section is as follows: — "After any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of fieri facias or elegit shall issue on any judgment obtained

7 G. 4. c. 57. does not prohibit a security for the old debt, nor forbid the holder from suing on one; but only gives the defendant a certain form of plea, by which he may defeat the action. The case differs in this respect from the provisions of the statutes against usury, or the sale of spirituous liquors in small quantities. Usury formerly avoided the security by the express provisions of the legislature. So, by 24 G. 2. c. 40. s. 12., parties are prohibited from bringing any action for the amount of liquors illegally retailed; and the Courts have held this prohibition to have the effect of vitiating a security which covers such a demand; *Scott v. Gillmore* (a). In those cases the contract is in part illegal. Here there is no illegality in any part of the transaction, nor is the security given in furtherance of any illegal contract. The case rather resembles that of infants, bankrupts,

1840.

SHEERMAN
against
THOMPSON.

obtained against such prisoner, for any debt or sum of money with respect to which such person shall have so become entitled; nor in any action upon any new contract or security for payment thereof, except from the judgment entered up against such prisoner according to this act; and that if any suit or action shall be brought, or any scire facias be issued against any such person, his or her heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognizance acknowledged by, such person for the same, except as aforesaid, it shall and may be lawful for such person, his or her heirs, executors, or administrators, to plead generally that such person was duly discharged according to this act by order of adjudication made in that behalf and that such order remains in force, without pleading any other matter specially; whereto the plaintiff or plaintiffs shall or may reply generally, and deny the matters pleaded as aforesaid; or reply any other matter or thing which may shew the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied, in case the defendant or defendants had pleaded this act, and a discharge by virtue thereof, specially."

(a) 3 Taunt. 226.

VOL. XI.

3 Y

and

1840.

SHERRMAN
against
THOMPSON.

and others incapable of binding themselves, or competent only to do so in a certain manner. Where the acceptor of a bill like the present gave a warrant of attorney in an action for the whole amount, the Court refused to set it aside, because his proper remedy was to plead his discharge; *Philpot v. Aslett* (a). In *Smith v. Alexander* (b) judgment upon a warrant of attorney, given by an insolvent to secure an old and a new debt, was set aside to the extent of the former only.

R. V. Richards, contra. The act prevents a party from suing on any new security for the old debt. This is unquestionably such a security, though it also happens to include another debt. The plaintiff ought to shew some provision for dividing the security. [*Cole-ridge J.* The test seems to be this; would the general form of plea, given by the statute, be a complete defence of itself?] In *Smith v. Alexander* (b) the application was to the equity of the Court in a case not expressly provided for by the act, which does not mention warrants of attorney. *Evans v. Williams* (c) is in point. There principal and surety joined in a note; the principal was discharged as an insolvent, and afterwards joined the surety in a fresh note, including interest and charges on the old one, in consideration of the payee's forbearance to sue the surety. The second note, therefore, contained a sum, namely interest and charges, not included in the first; yet the plaintiff was not permitted to recover any thing upon it. *Ashley v. Killick* (d) is to the same effect. In *Philpot v. Aslett* (a) the Court refused to interfere, because the defendant had not pleaded

(a) 1 C. M. & R. 85.

(b) 5 Dowl. P. C. 13.

(c) 1 C. & M. 30.

(d) 5 M. & W. 509.

as the act required ; it is, therefore, rather an authority that such plea would have been good. The language of the act is clear ; it provides that in any action brought on a new security for the old debt, the defendant may plead his discharge. To make the plea only a partial defence will not give effect to this language. There is no difficulty in finding another remedy, for the plaintiff may sue on the original cause of action as to the good part of the consideration.

1840.

—
SHEERMAN
against
THOMPSON.

Creasy, in reply. *Smith v. Alexander (a)* is unanswered. A warrant of attorney is a "security" within the meaning of that word in the statute. In *Evans v. Williams (b)* and in *Ashley v. Killick (c)* the new security included nothing but the old debt, or other sums from which the insolvent would have been equally discharged.

LORD DENMAN C. J. This case turns on the sixty-first section. If that had made the new security void in express terms, no doubt the plea would have been good. *Evans v. Williams (b)* does, at first sight, seem to favour the defendant's view of the law ; but the judgment does not appear to have proceeded on any ground now urged on the part of the defendant. The interest and charges there mentioned were possibly part of the old debt : at all events, no reliance appears to have been placed upon them, nor did they form any part of the new consideration which was alone the ground of distinction insisted upon in argument. By deciding against the defendant, we do not deprive him

(a) 5 Dowl. P. C. 13.

(b) 1 C. & M. 30.

(c) 5 M. & W. 509.

1840.

—
SHEERMAN
against
THOMPSON.

of the protection of the statute as to the old debt, but he remains liable on the security to the extent of the new one.

LITLEDALE J. The defendant might have pleaded his discharge as to part of the amount of the bill. There might be some difficulty indeed, if a bond were given as the new security; but here there is none. He may have different defences as to different parts of the bill.

COLERIDGE J. I am of the same opinion. As between drawer and acceptor, the defendant may be only partially liable. Of course I confine myself to divisible securities like the present. The object of the act was to prevent any proceeding in respect of an old debt, except that which the act has provided. A new security is therefore rendered unavailing *pro tanto*. But the purpose of the act does not require that a divisible instrument, given to secure the old and also a new debt, should be avoided in toto. The words of the section are all confined to the original debt, and are to be construed with reference only to "such debt." None of the cases cited are at all at variance with our judgment upon this. In *Evans v. Williams (a)* the Court only address themselves to the argument of counsel, who urged that a contract to pay the old debt, founded on a fresh consideration, might be enforced notwithstanding the discharge.

S.

Judgment for the plaintiff (b).

(a) 1 C. & M. 30.

(b) See *Denne v. Knott*, 7 M. & W. 143.

1840.

HOWDEN against HAIGH and Another.*Thursday,
May 14th.*

DECLARATION by payee against maker on three promissory notes; viz. a count on a note dated 26th July 1838, for 77*l.* 6*s.* 3*d.* payable to plaintiff six months after date; another count on a note of the same date and amount payable nine months after date; and a third count on a note of the same date and amount payable twelve months after date.

Plea; that before the making of said promissory notes, defendants were indebted to plaintiff and to divers other persons (naming them) in divers sums of money, which they were unable to pay without making sale of their estate and effects to the great prejudice of their trade; and thereupon, for the satisfaction of plaintiff and the other creditors, defendants then proposed to plaintiff and the other creditors to pay the respective amounts due to them in manner and at the times hereinafter mentioned, provided they would permit defendants to pursue their trade without molestation; that is to say, the sum of 5*s.* in the pound to be paid on the execution of articles of agreement between defendants and their said creditors to be prepared for the purpose of carrying the said proposition into effect, by promissory notes at two months with satisfactory security for the due payment thereof; and the remaining sum of 15*s.* in the pound to be paid by defendant's own notes by three equal instalments at six, nine, and twelve months from the date thereof; which said proposition plaintiff and the other creditors then

An agreement was made between defendant, and plaintiff and others, creditors of defendant, that defendant should pay, and that plaintiff and the other creditors should accept, the amount of their debts by certain instalments secured by defendant's notes; and it was at the same time, without the knowledge or consent of the other creditors, agreed between plaintiff and defendant, that defendant should indorse to plaintiff a bill, accepted by a third party, in order to give plaintiff a fraudulent preference, and induce him to become party to the composition: The notes being given and the bill indorsed by defendant in pursuance of this agreement,

Held, that plaintiff could not sue defendant even on the notes given for

the instalments; although plaintiff had not enforced or received payment of the acceptance when due.

1840.

HOWDEN
against
HAIGH.

agreed to; and plaintiff and said other creditors then mutually at each other's request agreed with each other and with the defendants, in consideration of the premises and of such mutual agreement as aforesaid, to accept their respective debts to be paid in manner aforesaid, and to execute articles of agreement as aforesaid, to be prepared within a reasonable time, for the purpose of carrying the said proposition into effect. That afterwards and within a reasonable time, to wit, on &c., in pursuance of said proposition and agreement &c., certain articles of agreement between defendants and plaintiff and the other creditors were duly prepared and executed by plaintiff and said other creditors, the said creditors then relying on said mutual agreement, [proffer of the articles sealed by the plaintiff and the other creditors] whereby plaintiff and said other creditors agreed to accept payment of their respective debts in manner aforesaid, and, in consideration thereof, severally granted to defendants full liberty and licence to attend to their trade and business &c. without any let, suit, or molestation by the plaintiff, or the said other creditors or any of them, for the space of twelve calendar months. Averment, that before and at the time of making the said proposal and agreement it was unlawfully and fraudulently agreed between plaintiff and defendants, without the knowledge or consent, and in fraud, of the said other creditors, that defendants should indorse a certain bill of exchange to the plaintiff, to wit, a bill drawn by defendants upon and accepted by J. and G. Bried for 76*l.* 12*s.*, in fraud of the other creditors and in order to give plaintiff a fraudulent preference beyond them, and to induce him to execute the said articles of agreement. That afterwards, to wit, on &c., defendants did, in pursuance of the said fraudulent agreement and in fraud of the

the

the other creditors, and for the purpose aforesaid, indorse and deliver the last-mentioned bill; and also make and deliver the three promissory notes in the declaration mentioned; the sum mentioned in the said notes amounting together to the sum in which defendants were so indebted to plaintiff as aforesaid in the proportion thereof of 15s. in the pound. Verification.

Replication; that the bill of exchange for 76*l.* 12*s.* mentioned in the plea has not, nor has any part of the amount thereof, been paid, although the same became due according to the tenor thereof before the commencement of the suit, to wit, on &c.; and that the plaintiff has not enforced or obtained payment of the said bill, or of any part thereof. Verification.

General demurrer and joinder.

Cowling, for the defendants. The replication is bad. It admits the fraudulent agreement to give the bill, and merely states that it has not been enforced. It does not shew that it has been given up, or that the claim upon it has been relinquished. It is, however, objected by the plaintiff that the plea itself is bad. The plea shews a fraud by which the plaintiff has forfeited his title to sue upon any of the securities; even those which are confined to the composition. It is evident that the defendants have misrepresented the amount of their assets by concealing this acceptance of Messrs. *Bried*. It is just as much a fraud as if the defendants had possessed a house or a ship which they agreed to assign to the plaintiff over and above the composition. The other creditors would not have consented to accept a composition and to relieve the defendants, if they had known of the undue preference stipulated for by the plaintiff. All

1840.

 HOWDEN
 against
 HAIGH.

1840.

—
 HOWDEN
 against
 HAIGH.

fraudulent creditors will enter into such agreements, if they are permitted to recover the composition; for they cannot be worse off, and they may gain by the fraud if not detected. The whole transaction is therefore tainted by fraud, which is indivisible. In this respect the case differs from *Sheerman v. Thompson* (a) just decided, where there was no illegality, and the security was therefore held divisible. The principle, on which it has been held that all private agreements for an exclusive advantage to one of the compounding creditors are fraudulent and void, is established in *Leicester v. Rose* (b), and in *Knight v. Hunt* (c). In the latter case, the action was brought for the composition, as here, and not to enforce the additional benefit; and the case is stronger than this, for there the benefit was not stipulated for, but was spontaneously offered by a third party.

Addison, contra. The cases are distinguishable. In *Leicester v. Rose* (b) the plaintiff sought to enforce the agreement by which the illegal advantage was secured. *Knight v. Hunt* (c) is an authority, if at all, for the plaintiff; for there the creditor, who sued on the note given for the composition, had been already paid the full amount of it under the arrangement by which he had been unduly indemnified; and Best C. J. in his judgment notices this fact, remarking that, as the plaintiff had been paid his composition in the coal supplied by the debtor's brother, he could not "have it again in money;" so that it rather appears that he would have been permitted to recover, if he had not been already satisfied. The principle is, that the plaintiff shall get nothing by

(a) *Ant2*, p. 1027.(c) *5 Bing.* 482.(b) *4 East*, 372.

his fraud. Here he will gain nothing by recovering on the notes; and it will be time to object fraud when he attempts to enforce the bill. The other creditors will derive no advantage if the plaintiff is defeated in this action, for they will still only be entitled to that which they have agreed to accept. It is rather presumable that the plaintiff will gain nothing in any view of the case, for the bill appears to have given in payment of the first instalment, and is therefore not fraudulent at all. [*Coleridge J.* The plea does not shew that.] Admitting fraud, there is no authority for holding the plaintiff's right to recover on the fair part of the transaction to have been forfeited. It is clear that he has received nothing on the bill, and non constat that he ever will. If the plaintiff were now suing on a single, entire, security, which included some fraudulent payment to himself, the plea might be a defence as to the whole; but a distinct fraud, contemplated in a collateral contract which the plaintiff has not attempted to enforce, is no more an answer to this demand, than it would be to an action for the original debt, which he will certainly be entitled to recover if defeated in this suit.

Cowling, in reply. The plaintiff is punished for his fraud by the loss even of that which he might lawfully have recovered. He tries to defraud the other creditors, and must therefore lose all by the experiment. [*Little-dale J.* Do the cases bear you out in that general proposition? The plaintiff has not been paid already, nor does he enforce the illegal security.] The whole transaction is vitiated, and the fraud cannot be separated merely because it formed the subject of a separate security. *White v. Wright (a)* is an authority for this. Both the bill and

1840.

 HOWDEN
against
HAIGH.

(a) 3 B. & C. 279.

1840.

—
 HOWDEN
 against
 HAIGH.

the notes are given in pursuance of the fraudulent agreement. The plaintiff may still sue the acceptor on the bill, or may have already negotiated it for value. *Knight v. Hunt (a)* does not turn on the point of previous satisfaction, though it was certainly a fact in the case.

Lord DENMAN C. J. I would use the words of Lord *Ellenborough (b)* in *Leicester v. Rose*; that "From the first mention of this case to the present moment, I have never entertained a particle of doubt upon it." Every part of the transaction is clearly bad. The plaintiff may still, perhaps, obtain the benefit of his additional security by suing upon it or negotiating it, and thereby secure to himself the unfair advantage contemplated by him. In that case, as here, it was argued that the stipulation did not alter the condition of the insolvent, or give to the creditor more than he was entitled to; but the principle of the decision was, that every creditor is to be on the same equal footing, and none shall privately exact better terms for himself. So in *Knight v. Hunt (a)*, where it was argued that neither the debtor nor his funds were prejudiced by the agreement, the Court disregarded that argument, holding the question to be "whether the judgment of the creditors has been influenced by the supposition, that all are to suffer in the same proportion?" I approve of the language of the Court in that case, and consider that if other creditors are deceived, it is immaterial in what part of the transaction the deception was practised. The whole is avoided.

LITLEDALE J. Many cases have been decided upon the legality of exclusive agreements with insolvent parties, but none exactly resembles the present. *Leicester*

(a) 5 Bing. 432.

(b) 4 East, 380.

v. *Rose*,

v. Rose (a) and *Knight v. Hunt (b)* are distinguished by the circumstances already noticed. The defendant seeks to extend these cases so as to destroy the security given even for the legal amount of composition. Upon the facts, as disclosed in the plea and confessed on the record, I think the fraud must be held to extend over the whole. The agreement contained a fraudulent stipulation, which had the effect of depriving the creditors of part of the assets of the defendants: it was therefore wholly void. It is possible that the plaintiff may be entitled to sue for the original debt; but it is unnecessary to decide that point.

1840.

HOWDEN
against
HAIGH.

COLERIDGE J. The principle of the cases is entire good faith, which the creditors have a right to expect from each other and from the debtor. There is to be no collusion between the debtor and the favoured creditor, and each creditor is to stand on the same footing. Here the conditions of such an arrangement are not complied with. The indorsed bill is abstracted from the general assets of the debtor, and the plaintiff obtains an additional security. It is admitted on the part of the plaintiff that he cannot sue on the bill; but the transaction is said to be divisible. That is not so; for the indorsing of the bill is part of the consideration for taking the notes, and that consideration is illegal. The action therefore seeks to give effect to part of the fraudulent agreement.

S.

Judgment for the defendant.

(a) 4 *East*, 372.(b) 5 *Bing.* 432.

1770/1

1770/1

1770/1

1770/1

1770/1

1770/1

1770/1

1770/1

1770/1

1770/1

1770/1

1770/1

1770/1

AN
INDEX
TO
THE PRINCIPAL MATTERS.

ABUTTALS.

p. 665. *Way*, II. 1.

ACCEPTANCE.

Of office, 505. *Affidavit*, I. 1. 508.
Quo Warranto, VI. 1.

ACCORD.

In an action for a trespass committed by defendant as servant, and by command of *P. B.*, acceptance of satisfaction of plaintiff from *P. B.* is a defence.

Where defendant introduces an immaterial averment in his plea, plaintiff cannot in his replication so traverse the matters of the plea as to include such immaterial averment in the issue: Therefore where defendant in trespass pleaded that the trespass was committed by command of *P. B.*, and then stated an executed accord between plaintiff and *P. B. with the consent of defendant*, and acceptance thereof by plaintiff in satisfaction of the trespasses: Held, that a replication traversing the accord and execution thereof *with the consent of defendant* was bad on special demurrer; for that, as no rights of the defendant appeared to be compromised by the accord, his consent was unnecessary. *Thurman v. Wild*, 455.

ACKNOWLEDGMENT.

p. 418. *Turnpike*, I. 1. 792. *Stamp*, I. 934. *Infant*.

ACQUIESCENCE.

In the making of an order, 913. *Costs*, II. 2.

ACTION.

Cause of, 301. *Case*, II. 5.

ADDRESS.

Absence of, 934. *Infant*.

ADJOURNMENT.

Of trial of appeal, 87. *Poor*, XIV. 1.

ADMINISTRATOR.

Executors and Administrators.

ADMISSION.

I. By not determining claim, 66. *Statute*, LI. 5.
II. See *Evidence*, VIII. *Pleading*, X.

ADVERSE

ADVERSE POSSESSION.

.44. *Pleading*, III. 1. 1008. *Devise*, II.

AFFIDAVIT.

I. Requisites.

1. Certainty and particularity.

Under stat. 5 & 6 W. 4. c. 76. the Court will not grant a quo warranto information unless it be shewn that the party is in office de facto; and for this purpose, it is not enough if the affidavit states simply that he has "accepted the office," without specifying the mode of acceptance, although it be sworn that the presiding alderman has declared the party duly elected. *Regina v. Slatler*, 505.

2. What it must set out, 167. *Plea*, V.3. When it must shew identity, 159. *Certiorari*, I. 2.4. See also 508. *Quo Warranto*, VI. 1.

II. Effect.

1. What not inquirable on, 273. *Parliament*, II. 2. 590. *Partner*, III. 1.2. In reply, 508. *Quo Warranto*, VI. 1.

AGENT.

I. Dealings by agent.

1. Right to sell in his own name, 549. *Custom*, I. 2.2. Custom of payment to, *Heisch v. Carrington*, 555. n.3. Intention to deal on his own account, 589. *Post*, III.

II. Remedies of agent against principal.

1. For supplying inferior goods, 549. *Custom*, I. 2.2. Explanation of instructions by reference to local custom, 549. *Custom*, I. 2.

III. Liability of principal on sales by agent.

Defendant, a merchant residing at *St. Petersburg*, carried on business in *London* through *H.*, who had himself no capital or credit, and was universally known to represent defendant, though *H.*'s name was always used. Defendant gave notice to *H.* that he purposed to cease employing him: after which *H.* contracted with plain-

tiff to sell him tallow (of more than 10*l.* value); and *H.*'s name was used as before. *H.* intended to make the contract on his own account: but plaintiff did not know this, and believed that *H.* represented defendant as usual. The contract was made by a broker, *W.*, acting for both parties. He signed bought and sold notes; the former beginning "Bought for *T.*" (the plaintiff); and the latter "sold for *H.* to my principals:" no buyer or seller being further named.

1. Held, that defendant was liable for the nondelivery of the tallow, plaintiff having no notice that the name of *H.* ceased to mean defendant; that the bought and sold notes constituted a sufficient note in writing to charge defendant within stat. 29 C. 2. c. 3. s. 17.; and that no objection lay to the admission of parol evidence of the above facts, as varying the written instrument.

2. Evidence was offered, by defendant, of a custom in the tallow trade, that, on such contracts as the above, "a party might reject the undisclosed principal, and look to the broker for the completion of the contract." Held inadmissible, as varying a written instrument.

3. And semble, that, if such evidence were admissible, the custom would not apply here; the principals being, in fact, disclosed to the broker, who acted for both parties. *Traceman v. Loder*, 589.

IV. Liability of agent to third person.

For payments to him, 927. *Auction*.

V. Disclosure of principal.

To common broker, 589. *Ante*, III.

VI. Consignment, 888. *Shipping*, I.

AGGRAVATION.

Of damages, 28. *Covenant*, III. 1.

AGREEMENT.

Contract.

ALDERMAN.

Municipal Corporations, IV. *London*, I.

ALTERATION.

ALTERATION.

ALTERATION.

- p. 31. *Bills*, III. 418. *Turnpike*, I. 1.

AMENDMENT.

- I. What issue not tried without, 665. *Way*, II.
II. Of entry of verdict, 179. *Foreign judgment*, 186. *Slander*, II.
III. Of bill of exceptions, 1008. *Devise*, II.

AMERCIAMENT.

- p. 383. *Sewers*, I.

ANSWER.

- Right of opportunity, 508. *Quo warranto*, VI. 1. 520. *Partner*, III. 1.

APPEAL.

- I. See *Compensation*. *Poor*. *Prohibition*. *Notice*, III.
II. Jurisdiction of recorder, 170. *Poor*, XVIII.
III. When not the only remedy, 993. *Land-tax*.

APPEARANCE.

- I. What is, 179. *Foreign judgment*.
II. To shew cause, effect of, 144. *Certiorari*, I. 1.

APPORTIONMENT.

- Of repairs, 343. *Turnpike*, II.

APPRENTICE.

- Poor*, IX.

ARBITRATION.

- I. Award.
As to plurality of counts. *Dewar v. Swaby*, 913.
II. Execution on rule of Court, 175. *Execution*, VI.

ARGUMENTATIVENESS.

- Pleading*, XV.

ASSUMPSIT, I.

1045

ARREST OF JUDGMENT.

Judgment.

ASSAULT.

- I. By deputy, 813. *Marshal*, I.
II. Remedy. *Election*.

Defendant threatened prosecutor to assault him the first time they met in the street, to which prosecutor answered that he would give defendant into custody if he did so. On their meeting afterwards in the street, defendant assaulted prosecutor, who thereupon called a policeman and gave defendant into custody, but without warrant, the policeman thinking it unnecessary, though he had not witnessed the assault, as defendant confessed it. Defendant was locked up at the station-house till he gave bail to appear before a police magistrate. He appeared accordingly; but prosecutor declined to press the charge there, saying that he should take another remedy; and he afterwards moved for a criminal information.

Held, that the prosecutor could not be considered as having elected his remedy in the first instance, so as to preclude himself from moving for an information. *Regina v. Gwilli*, 587.

- III. Son assault demesne, 816. *Pleading*, I.

ASSENT.

- To bequest, 842. *Fine*, I.

ASSESSMENT.

- p. 73. *Poor*, IV. 1. 993. *Land-tax*.

ASSIGNEE.

- I. Of lease, 645. *Executor*, I.
II. See *Bankrupt*. *Insolvent*.

ASSIGNMENT.

- Of convict, 108. *Transportation*.

ASSUMPSIT.

- I. By trustee payee of note, 661. *Pleading*, XL 1.

- II. For

- II. For reward advertised, 856. *Constable*, I.
 III. Money had and received, 926. *Auction*.

ASYLUM.

Pauper lunatic, 170. *Poor*, XVIII.

ATTACHMENT.

Against sheriff, 255. *Parliament*, I.

ATTORNEY.

- I. Acts done by. Notice for certiorari, 144. *Certiorari*, I. 1.
 II. His authority.

To discharge defendant in execution.

In an action against the marshal for permitting the escape of a party imprisoned in execution, it is not sufficient to plead that the attorney for the plaintiff at whose suit the party was imprisoned did, as such attorney, require and license the marshal to discharge the prisoner. The plea ought to shew either that the plaintiff had given express authority for the discharge, or that the amount for which the execution issued had been paid to him or his attorney.

Quare, whether a plea in the latter form would justify the marshal, if the plaintiff suing out execution had become bankrupt between the commitment and the order to discharge, and an action of escape was brought by his assignee. *Savory v. Chapman*, 829.

- III. Liability to strangers.

For payments on account of his client, 926. *Auction*.

AUCTION.

On sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchaser, and by the vendor's attorney, subscribing himself as "agent for the said S. S." the vendor. The purchaser paid his deposit to the attorney, who gave a receipt, signed by himself as "agent for S. S." The sale going off through the vendor's default, and the deposit money not being returned:

Held, that the purchaser could not

BANKRUPT, I.

bring an action of money had and received against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor. *Bamford v. Shuttleworth*, 926.

AUDITOR.

Of union, 558. *Poor*, I. 1.

AUTHORITY.

- I. To draw bills, 339. *Bills*, II.
 II. Evidence of, 815. *Marshal*, I.
 III. Of attorney, 829. *Attorney*, II.
 IV. In warrants, 275. *Parliament*, II.
 V. To bind firm, 339. *Bills*, II. 959.
Partner, I. 3.

AWARD.

Arbitration.

BANKING COPARTNERSHIP.

Partner, III.

BANKRUPT.

- I. Petitioning creditor's debt.

An order made by the Lord Chancellor under stat. 6 G. 4. c. 16. s. 18. must shew on the face of it whatever is necessary to give jurisdiction. *E.g.* That the creditor applying to have his debt substituted for that of the petitioning creditor had proved a sufficient debt before making the application.

And this is not shewn sufficiently by stating that the application was made by persons who were creditors of the bankrupt, "and that their debt" proved under the fiat, "or so much thereof as was sufficient to support such fiat," was incurred not anterior to the debt of the petitioning creditor.

Where the order stated such application made by *B.*, and that the debt of *C.*, the petitioning creditor, was insufficient to support the fiat, and that the debt of *B.*, proved under the fiat, was incurred not anterior to the said debt of *B.* (instead of "*C.*"): Held, that the words "of *B.*" might be rejected as surplusage, and that the order sufficiently

BANKRUPT, I. II.

ciently shewed *B.*'s debt to be not anterior to that of the petitioning creditor. *Christie v. Unwin*, 373.

II. Illegal composition.

Under stat. 6 *G. 4. c. 16. s. 8.*, which enacts that a petitioning creditor illegally compounding with the bankrupt shall forfeit his debt, such forfeiture takes effect for the benefit of the creditors under the commission, and cannot be enforced if there is no longer a commission subsisting.

Bills of exchange given to the petitioning creditor, by way of such illegal composition, cannot be enforced by him; but if, since the agreement was executed, no further proceedings have been taken in the bankruptcy, he may sue the bankrupt on the original consideration.

In pleading such illegal composition to an action on the original debt, it must be shewn that the original fiat was proceeded with, or a new one issued, after the composition.

The illegal composition is not pleaded with sufficient certainty by alleging that defendant, being indebted to plaintiff and others, became bankrupt; that a fiat issued on plaintiff's petition; that, the fiat being in force, and defendant still indebted to plaintiff and the said others, and before defendant was adjudged a bankrupt, it was, contrary to the statutes, agreed between plaintiff and defendant, without the consent of the said other creditors, that plaintiff should abandon the fiat, and defendant, in consideration thereof, should pay him a sum reducing his debt to 90*l.*, and give him bills for the residue; and that, in pursuance of such agreement, defendant did afterwards, viz. on &c., pay plaintiff the sum &c., and gave him bills for the residue, which plaintiff received in satisfaction of such residue.

Quære, whether such illegal composition be sufficiently shewn by stating that the agreement was to be executed in order that and whereby plaintiff might receive more in the pound than the other creditors; that when it was executed the fiat remained in force, and defendant continued indebted to plaintiff and the said other creditors; and that plaintiff received the payment and securities in satisfaction &c., and

VOL. XI.

BILL OF EXCEPTIONS. 1045

whereby he might receive more in the pound on his debt than the said other creditors. *Davis v. Holding*, 710.

III. Bankruptcy of plaintiff where defendant in execution, 829. *Attorney*, II.

IV. Reputed ownership, 350. *Post*, V.

V. Second and third commissions.

Stat. 6 *G. 4. c. 16. s. 127.* does not extend to the case where a trader has twice become bankrupt and obtained certificates, not paying 1*5s.* in the pound under the last commission, but both bankruptcies and certificates are prior to the statute. In that case, therefore, the after-acquired effects do not vest in the assignees under the second commission, and the act does not prevent the assignees under a third commission from claiming property of which the bankrupt has had the reputed ownership within sect. 72., since the second commission.

But, if the second certificate were subsequent to *May 2d, 1825*, when the act took effect as to certificates, sect. 127 applies.

Quære, whether in that case a third commission would be absolutely void. *Benjamin v. Belcher*, 350.

VI. Pleading: illegal composition, 710. *Antè*, II.

BARON AND FEME.

I. Husband.

1. Termor, acquiring the fee *jure uxoris*, 842. *Fine*, I.
2. When barred by non-claim, 842. *Fine*, I.
3. Wife's moral obligation, 438. *Consideration*, I. 2.

II. Wife: non-claim, 842. *Fine*, I.

BASTARDY.

Poor, XIX.

BEDFORD LEVEL.

p. 69. *Mandamus*, III. 1.

BILL OF EXCEPTIONS.

Amendment, 1008. *Devise*, II.

5 Z

BILL

BILL OF LADING.

p. 888. *Shipping*, I.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Form. What is a bill or note.

1. Conditionality.

An instrument in the following form: "At twelve months after date, I promise to pay Messrs. R. and Co. 500*l.*, to be held by them as collateral security for any monies now owing to them by I. M., which they may be unable to recover on realising the securities they now hold, and others which may be placed in their hands by him;" is not a promissory note, and cannot be declared on as such. *Robins v. May*, 213.

2. Not expressing consideration.

Debt may be maintained on a promissory note, by payee against maker, though the instrument do not express that it is for value received, or for any consideration.

So on a bill of exchange, by drawer, being also payee, against acceptor. *Hatch v. Traves*, 702.

II. Partnership: deviation from style.

Where a partner accustomed to issue notes on behalf of the firm indorses a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account in an action brought upon it by the indorsee, the proper question for the jury is, whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner.

So held where a partner in "The Newcastle and Sunderland Wall's End Coal Company" drew a note in the name of "The Newcastle Coal Company," and made it payable at a bank where the first mentioned company had no account. *Faith v. Richmond*, 339.

III. Effect of alteration.

Defendant gave plaintiff a promissory note, without the words "or

BONA FIDES.

order." Six months afterwards plaintiff mentioned the omission to defendant, who answered that the omission was his the defendant's own, and consented that the words should be inserted, which was done accordingly. The bill was not restamped.

The bill having been declared on & altered, and issue joined on a plea denying the making of the note: Held, that, on the above evidence, the jury were justified in finding for plaintiff, as it appeared that the alteration was made only in furtherance of the original intention of the parties, and to correct a mistake, in which case no new stamp was requisite. *Byrom v. Thompson*, 31.

IV. Stamp: restamping, 31. *Antè*, III.V. Mistake: how remedied, 31. *Antè*, III.VI. Forgery, 131. *Evidence*, XI.

VII. Consideration.

1. Promise by payee to pay creditors of maker, 661. *Pleading*, XI. 1.

2. Implied, 702. *Antè*, I. 2.

3. Illegal composition, 710. *Bankrupt*, II.

4. Gaming debt, 966. *Gaming*.

5. Debt from which drawer has been discharged, 1027. *Insolvent*, IV.

6. Composition with creditors, 1033. *Composition*, II. 2.

VIII. Payee.

As trustee, 661. *Pleading*, XI. 1.

IX. Remedy upon.

Debt, 702. *Antè*, I. 2.

X. Evidence.

1. Collateral facts, 131. *Evidence*, XI.

2. On traverse of promise to pay, 661. *Pleading*, XI. 1.

BIRTH.

p. 727. *Registration*.

BONA FIDES.

pp. 3. *Quo warranto*, V. 2. 98. *Evidence*, V. 380. *Slander*, I. 483. *Malicious Prosecution*, II. 906. 915. *Costs*, II. 1027. *Composition*, II. 2.

BOND.

BOND.

I. Execution: fraud: consideration, 490. *Post*, II.

II. Liability of corporation.

In an action of debt against a corporation regulated by stat. 5 & 6 *W. 4. c. 76.*, on a bond given by them to plaintiff for payment of 1249*l.*, it appeared on special verdict, that, before the passing of the act, plaintiff being an alderman of the borough, *quo warranto* informations were filed against him and several of his friends and relations, to try their right to be members of the corporation, and they were ultimately ousted; that plaintiff, without authority from the now defendants, caused the informations to be defended; and that, before the passing of the act, certain members of the corporation, then being the governing body, and having the custody of the common seal, and lawful power to affix it to instruments, did, on plaintiff's application, affix the seal to the said bond, and deliver it to him by way of reimbursement of the costs of such defences, and for no other consideration; that divers of the then burgesses of the corporation had no notice of the bond being given for that cause; and that the sealing and delivery thereof was without fraud, unless the sealing and delivery for the cause aforesaid was a fraud in law upon defendants, or the inhabitants, or the members of the corporation who did not concur.

Held that, on the facts found, the corporation were liable on the bond before stat. 5 & 6 *W. 4. c. 76.*

That the corporation, as subsisting under the statute, were still liable.

And that the liability was a "lawful debt," chargeable on the borough fund, within sect. 92. *Holdsworth v. Dartmouth, Mayor, &c.*, 490.

BREACH.

Declaration, I.

BROKER.

Agent.

BUILDING ACT.

p. 645. *Executor*, I.

CALLS.

Actions for, 418. *Turnpike*, I. 1.

CANAL.

I. Enrolment of deeds, 316. *Mandamus*, III. 2.

II. Conveyance when unnecessary, 463. *Poor*, V. 2.

III. Occupation when rateable, 463. *Poor*, V. 2.

IV. Duty to make navigation secure.

Declaration in case against a canal company stated that, by the canal act (stat. 32 *G. 3. c. 101.*), the company was formed to make and maintain the canal, with power to take tolls, and all persons had free liberty to navigate the canal; and, if any boat should be sunk in the canal, and the owner or person having care of it should not without loss of time weigh it up, it was, by the statute, to *be lawful* for the company to weigh it up, and detain it till payment of expenses: that the company completed the canal, and took tolls on it; that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger in running foul of it; that, although the company could, and ought to, have requested the owner &c. to weigh it up; and, if that was not done without loss of time, could, and ought to have weighed it up, and, in the meantime have caused a light or signal to be placed to enable boats to avoid it, yet the company did not cause the owner &c. to weigh it up, nor themselves weigh it up, nor place a light or signal: whereby plaintiff's boat, navigating the canal, ran foul of the sunken boat and was damaged.

Held, by the Court of Exchequer Chamber (affirming the judgment of the Court of Q. B.), that the declaration disclosed a sufficient duty and breach.

By the Court of Exchequer Chamber: such duty was not created by the clause enabling the company to weigh the boat, but arose upon a common law principle that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure, the want

of which reasonable care might be collected from the declaration, although the complaint was ostensibly founded on the statute. *Parnaby v. Lancaster Canal Company*, 223.

CAPIAS.

- I. Bankruptcy of plaintiff, 829. *Attorney*, II.
- II. Against remanded insolvent, 165. *Insolvent*, II.

CASE.

- I. Ground of action, 301. *Post*, II. 5.
 - In particular instances.
 1. Injury to reversion.

Building a roof with eaves which discharge rain water by a spout into adjoining premises is an injury for which the landlord of such premises may recover, as reversioner, while they are under demise, if the jury think there is a damage to the reversion. *Tucker v. Newman*, 40.
 2. For not making navigation secure, 223. *Canal*, IV.
 3. Page 329. *Malicious Prosecution*, I.
 4. For refusing to accept tender, 98. *Evidence*, V.
 5. For wounding servant.

In an action of tort for wounding plaintiff's servant, whereby he was disabled from serving, the jury may give damages for the loss of service, not only before action brought, but afterwards, down to the time when, as it appears in evidence, the disability may be expected to cease.

A declaration for such injury, stating the servant to have been *permanently* crippled, is supported by evidence that the injured part is still disabled, and likely to remain so, but, with care, will be restored in time. *Hodsoll v. Stallebrass*, 301.
- III. Probable cause, 98. *Evidence*, V.
- IV. Damages.
 1. Prospective, 301. *Antè*, II. 5.
 2. Permanent injury, 301. *Antè*, II. 5.

CERTAINTY.

See 505. *Affidavit*, I. 1. 508. *Quo warranto*, VI. 1. *Pleading*, XIII. *Warrant*.

CERTIFICATE.

- I. Of speaker, 297. *Parliament*, III.
- II. To deprive plaintiff of costs, 193. *Costs*, I.
- III. Against plurality of counts, 906. 913. *Costs*, II.
- IV. Bankrupt's, 350. *Bankrupt*, V.

CERTIORARI.

I. Preliminaries.

1. Signature of notice.

Under stat. 13 G. 2. c. 18. s. 5, notice to justices of motion for a certiorari, subscribed by A. B., "solicitor for C. D.," the party intending to move, and in other respects regular, is sufficient to authorise the motion, though the notice does not expressly state that C. D. is suing forth the certiorari, and there be no affidavit that the notice is in fact served at the instance of C. D., if the justices shew cause and do not offer affidavits to the contrary.

An order of county justices, authorising a contract with the council of a borough, for the maintenance of borough prisoners in the county House of Correction in pursuance of stat. 5 G. 4. c. 85. s. 1., and 5 & 6 W. 4. c. 76. s. 114., is an order made, under the former statute, though the town council derive their power of contracting from the latter. And therefore stat. 5 & 6 W. 4. c. 76. s. 132. does not prevent the removal of such order by certiorari.

A borough, though chartered by the Crown under stat. 7 W. 4. and 1 Vict. c. 78. s. 49., and having a grant of quarter sessions, cannot contract with the justices of the next county or division for the maintenance of borough prisoners in their House of Correction under stat. 5 G. 4. c. 85. s. 1., and 5 & 6 W. 4. c. 76. s. 114., if the borough has never had a gaol of its own. *Regius v. Lancashire Justices*, 144.

2. What the notice must state.

Under stat. 15 G. 2. c. 18. s. 5, notice to justices of an application for a certiorari to bring up their order, should state that the notice is given by the party suing forth the certiorari, and should specify the party. And upon such application, the party suing forth

forth the writ should be identified on affidavit with the prosecutor named in the notice; and the justices therein named with those on whom notice has been served.

It is not enough that the party giving the notice is the only person making affidavit in support of the rule on the merits; or that, from such affidavit it appears that an order was made by justices of the same name as those to whom the notice is given, and was of the same date and to the same effect as that described in the notice and the rule nisi. So held on cause shewn against such rule.

The objection to the notice is not cured by the rule nisi being enlarged by consent. *Regina v. How*, 159.

3. Affidavits, 144. 159. *Antè*, 1, 2.

4. Identification, 159. *Antè*, 2.

II. Clauses taking away.

1. What irregularities do not prevent its operation.

A railway act (stat. 7 *W.* 4. c. xxi. local and personal, public) directed that the purchase-money of lands taken by the company should be assessed by a jury impanelled by the sheriff or undersheriff, or, in case they should be interested, by certain other persons specified therein, to whom a warrant was to be issued by the company, and by whom the jury and the witnesses were to be sworn. It also provided that the verdict and judgment should be deposited with the clerk of the peace, and be deemed records to all intents and purposes; and that no proceedings taken in pursuance of the act should be removed by certiorari.

Held, that a certiorari would not lie to remove an inquisition, on the ground that it was taken before two persons (namely, an assessor and a clerk of the under-sheriff, by whom the jury and witnesses were sworn), appointed pro hac vice by the sheriff, but not being any of the persons specially named in the act. *Regina v. Sheffield Railway Company*, 194.

2. When not taken away by Municipal Corporation Act, 144. *Antè*, I. 1.

3. See also 302. n. *Post*, III.

III. When refused.

To remove a void proceeding.

A railway act (6 & 7 *W.* 4. c. xxxvi.)

directed that compensations for lands taken by the company, in certain cases, should be assessed by a special jury; that the deviation from the line of railway mentioned in the act should not exceed a specified distance, and that no proceedings taken in pursuance of the act should be removed by certiorari.

A certiorari was applied for to remove an inquisition, on affidavits that the jury appeared by the inquisition not to be special, though the case was one in which a special jury was requisite, and that there had been a deviation greater than the act allowed.

Writ refused, because, if the proceedings were in pursuance of the act, the certiorari was taken away, and, if not in pursuance of the act, they were merely void. *Regina v. Bristol and Exeter Railway Company*, 302. n.

IV. Practice.

1. Misdescription in writ, 75. *Poor*, IV. 1.

2. Objections to return, when to be taken and how, 75. *Poor*, IV. 1.

3. Costs.

Under stat. 5 & 6 *W. & M.* c. 11. s. 3., if a defendant be indicted on two different counts, and remove the indictment by certiorari, (and be convicted on one count and acquitted on the other, he is liable only for the costs incident to the first. *Regina v. Hawdon*, 143.

V. In railway cases, 194. 302. n. *Antè*, II. 1. III.

CESTUI QUE TRUST.

When he may sue, 335. *Landlord and Tenant*, IX. 2.

CHAIRMAN.

I. Of vestry, his decisions, 15. *Vestry*, I.

II. Casting vote, 869. *Statute* II. 1.

CHARACTER.

In case of seduction, 803. *Witness*, II. 1.

CHARTER.

Municipal Corporation, I.

3 Z 3

CHOSE

CHOSE IN ACTION.

Not within Statute of Frauds, 205. *Statute*, XII. 1.

CHURCH-RATE.

p. 743. *Prohibition*.

CIRCUITY.

I. A covenant by *A.* not to sue defendant for any debt due from him to *A.* cannot be pleaded as a release in bar of an action by *A.* and *B.* for a debt due to them jointly. *Walmsley v. Cooper*, 216.

II. Modification of statute to avoid. *Windle v. Freeman*, 545.

III. See also 307. *Mortgage*, I.

CLERK.

I. Justices', 9. *Statute*, II. 4.

II. Of union, 558. *Poor*, I. 1.

COALS.

In a *qui tam* action, under stat. 1 & 2 *W. 4. c. lxxvi. s. 57.*, for delivering coals short of weight, the declaration must aver that the coals were carried, for delivery, from a ship, wharf, &c., or place in *London* or *Westminster*, or within twenty-five miles of the General Post Office in *London*.

It is not sufficient to allege that they were sold and delivered at such place. So held on general demurrer. *Frend v. Butterfield*, 838.

COGNOVIT.

p. 966. *Gaming*.

COLLUSION.

p. 3. *Quo warranto*, V. 2.

COLONIES.

Governor of penal, his power, 108. *Transportation*.

COLOUR.

In pleading, 44. *Pleading*, III. 1.

COMMISSION.

Bankrupt. Land tax. Poor. Sewers.

COMMITMENT.

Parliament. Constable.

COMMONS.

House of. *Parliament*.

COMPANY.

I. See *Partner. Canal*.

II. 1. Joint stock: shares, 205. *Statute*, XII. 1.

2. Possession of land by, 205. *Statute*, XII. 1.

COMPENSATION.

I. In railway and canal cases.

1. Irregularities, 194. 202. n. *Certiorari*, II. 1. III.

2. Operation as a statutory conveyance, 463. *Poor*, V. 2.

II. Under Municipal Reform Act.

1. Informality of claim, 66. *Statute*, LI. 5.

2. Admission by omitting to determine, 66. *Statute*, LI. 5.

3. Jurisdiction, 9. *Statute*, LI. 4.

COMPETENCY.

Witness, I.

COMPOSITION.

I. Illegal, 710. *Bankrupt*, II.

II. With creditors.

1. When not pleadable to a partnership debt, 216. *Circuitly*, I.

2. Fraudulent agreement.

An agreement was made between defendant, and plaintiff and others, creditors of defendant, that defendant should

COMPOSITION, II. 2.

should pay, that plaintiff and the other creditors should accept, the amount of their debts by certain instalments secured by defendant's notes; and it was at the same time, without the knowledge or consent of the other creditors, agreed between plaintiff and defendant, that defendant should indorse to plaintiff a bill accepted by a third party in order to give plaintiff a fraudulent preference, and induce him to become party to the composition. The notes being given and the bill indorsed in pursuance of this agreement:

Held, that the plaintiff could not sue defendant even on the notes given for the instalments, although plaintiff had not enforced or received payment of the bill when due. *Howden v. Haigh*, 1033.

CONCILIUM.

p. 955. *Mandamus*, IV. 2.

CONDITION.

I. pp. 431. *Devise*, IV. 215. *Bills*, I. 1.

II. In indorsement of bill of lading, 888. *Shipping*, I.

CONFESSION.

In pleading, 816. *Pleading*, I.

CONSENT.

I. To accord with third person, 455. *Accord*.

II. In examinations, 616. *Poor*, XIII. 3.

III. When not a waiver, 159. *Certiorari*, I. 2.

IV. Jurisdiction not created by, 941. *Writ of trial*.

V. See also *Acquiescence*. *Assent*.

CONSIDERATION.

I. Moral or executed.

1. Debt for wages as hired servant.

Plea, that plaintiff was hired on the terms, that if he should be drunk during service, he should forfeit all wages then due: that after the wages became due, and whilst plaintiff was in defendant's service, he was drunk, whereby &c. Replication, that after

CONSIDERATION, I. 1, 2. 1051

plaintiff was drunk, defendant exonerated him from the forfeiture, and agreed to pay him the wages already due as aforesaid, and continued to employ him as such servant.

New assignment, that part of the wages accrued due before plaintiff was drunk, and the rest afterwards, and that plaintiff declared not only for wages due before but also for wages due after &c.

Held, on special demurrer, that the replication was bad for not shewing any consideration for agreeing to pay the forfeited wages. Held also, that the replication and new assignment together were not double, for the plea applied only to wages due before forfeiture, and the new assignment to wages due after.

Where defendant demurs to a replication and new assignment for that "they are not, nor is either of them sufficient in law," and shews for causes that the replication is bad in itself, and both together bad for duplicity, the demurrer is divisible, and judgment may be for defendant on the replication, and for plaintiff on the new assignment. *Monkman v. Shepherdson*, 411.

2. Defendant may shew, under non assumpsit, that the promise was within stat. 29 Car. 2. c. 3. s. 4., and was not in writing.

Section 4. of that statute, as to promises to pay the debt of another, contemplates only promises made to the person to whom another is liable; therefore a promise by defendant to plaintiff to pay *A. B.* a debt due from plaintiff to *A. B.*, is not within the statute.

A pecuniary benefit voluntarily conferred by plaintiff, and accepted by defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise by defendant to reimburse plaintiff.

Therefore, where the declaration in assumpsit stated that plaintiff was executor of the father of defendant's wife, who died intestate as to his land, leaving defendant's wife, an infant, his only child and heir; that plaintiff acted as her guardian and agent during infancy, and in that capacity expended money on her maintenance and education, in the management and im-

provement of the land, and in paying the interest of a mortgage on it; that the estate was benefited thereby to the full amount of such expenditure; that plaintiff, being unable to repay himself out of the personal assets, borrowed money of *A. B.*, on his promissory note; that defendant's wife, when of age, and before marriage, assented to the loan and the note, and requested plaintiff to give up the management of the property to her, and promised to pay the note, and did, in fact, pay one year's interest on it; that plaintiff thereupon gave up the management accordingly; that defendant, after his marriage, assented to the plaintiff's accounts, and upon such accounting a certain sum was found due to plaintiff for monies so spent and borrowed; that defendant, in right of his wife, received all the benefit of plaintiff's said services and expenditure, and thereupon, in consideration of the premises, promised plaintiff to pay and discharge the note:

Held, on motion in arrest of judgment, that the declaration was bad as not disclosing a sufficient consideration for defendant's promise. *Eastwood v. Kenyon*, 438.

3. Performance of independent duty, 856. *Constable*, I.

II. Adequacy, 982. *Duress*, I.

III. Of bills. *Bills*, VII.

IV. Pleading.

p. 411. *Ante*, I. 1. 661. *Pleading*, XI. 1. 710. *Bankrupt*, II.

CONSIGNMENT.

p. 888. *Shipping*, I.

CONSTABLE.

I. Title to advertised reward.

Defendant offered a reward to whoever could give such information as would lead to the conviction of a felon. Plaintiff, who was constable and police officer of the district where the felony was committed, gave such information.

Held, on demurrer, that plaintiff's having given the information was a good consideration for a promise by

defendant to pay the reward. *Reginald v. Davidson*, 856.

II. Duty to apprehend felons, 856. *Ante*, I.

III. Justification under warrant.

1. In an action of false imprisonment against constables who had carried plaintiff to gaol on a justice's warrant for non-payment of arrears on an order of maintenance (stat. 49 G. 3. c. 68. s. 3.), it was objected,—

1. That the warrant, though purporting to be made on a hearing at which plaintiff was present, had not been made then, but suspended for a month after (to give plaintiff an opportunity of consulting his friends); and that it was issued at the end of the month, on plaintiff's default, after fresh demand, without further hearing, and when plaintiff was in a different county from that in which the justice acted.

2. The warrant being indorsed by a justice of the county in which plaintiff was; that the indorsement did not purport to be made upon such proof on oath as stat. 24 G. 2. c. 55. s. 1. requires, nor was it shewn by evidence that such proof had been given.

Quære, whether these were valid objections. But

Held that, at all events, they resolved themselves into a denial of jurisdiction, and that the warrant, though made without jurisdiction, entitled the constables to the benefit of stat. 24 G. 2. c. 44. s. 6.

On demand, by plaintiff's agent, of a perusal and copy of the warrant, defendants gave a copy, and said that the original was in the hands of the gaoler; the agent said he knew that, and made no objection to the tender of a copy. The gaoler, in fact, always kept such warrants. Held, a sufficient compliance with the demand, under stat. 24 G. 2. c. 44. s. 6.

The warrant required the constable forthwith to take plaintiff to the house of correction at *W.*, and there deliver him to the keeper, who was to keep him to hard labour for three months, unless he should sooner pay the maintenance to the overseers. Plaintiff tendered the arrears to the constable at *T.*, where he was arrested, and to the overseers of *B.* (the complaining parish), at *B.*, to which place he was taken

CONSTABLE, III. 1, 2.

taken on his way to *W.* Held, that the constable and overseer were not authorised to accept such tender.

B. was eighteen miles out of the direct road to *W.*, and plaintiff desired to be taken by the direct road. The Judge, in summing up, left it to the jury to say whether the route by *B.*, though circuitous, was the most convenient; and they found that it was. Held, that the summing up was proper, and that the finding entitled the defendants to a verdict; it not having appeared by the evidence that plaintiff had in fact been put to any unnecessary inconvenience. *Atkins v. Kilby*, 777.

2. Tender to, 777. *Antè*, 1.

CONSTRUCTION.

I. Of statutes.

1. So as to give full meaning, 688. *Prescription*, I.
2. Where there is a variation in the language, 656. *Poor*, IX. 2.
3. Not merely directory, 15. *Vestry*, I. 38. *Poor*, IV. 2.
4. Strict, 90. *Poor*, XIV. 2.
5. Enlarged, 343. *Turnpike*, II.
6. Literal, 9. *Statute*, I. 1. 4.
7. Not restricted, 108. *Transportation*.
8. Not strained with a view to consequences, 144. *Certiorari*, I. 1.
9. With regard to consequences, 73. *Poor*, IV. 1. 343. *Turnpike*, II.
10. Notwithstanding absurdity, 688. *Prescription*, I.
11. Permissive clauses, 223. *Canal*, IV.
12. Not retrospective, 350. *Bankrupt*, V.
13. So as to give relation, 1008. *Devisé*, II.
14. By rejecting words, 350. *Bankrupt*, V.
15. Restriction to last antecedent, 73. *Poor*, IV. 1.

II. Particular words and phrases.

1. "Accepted the office," 505. *Affidavit*, I. 1.
2. "To answer for the debt" "of another person," 458. *Consideration*, I. 2.

CONSTRUCTION, II. 5—50. 1053

3. "Apparent," 913. *Costs*, II. 2.
4. "Business to be done," 869. *Statute*, LI. 1.
5. "Demand," 941. *Writ of trial*.
6. "Lawful debt," 490. *Bond*, II.
7. "Distinct," 913. *Costs*, II. 2.
8. "Every body politic or corporate, and person or persons," 343. *Turnpike*, II.
9. "Executing," 529. *Sheriff*, VIII. 1.
10. "Goods, wares, or merchandizes," 205. *Statute*, XII. 1.
11. "Have obtained," 350. *Bankrupt*, V.
12. "Incident to the sale and conveyance," 796. *Stamp*, II.
13. "Instantly," 119. *Coroner*, I. 2.
14. "Interruption," 688. *Prescription*, I.
15. "Judgments" "shall be utterly void," 966. *Gaming*.
16. "Landlord," 535. *Landlord and Tenant*, IX. 2.
17. "Then levied the same thereout," 529. *Sheriff*, VIII. 1.
18. "May," 223. *Canal*, IV. 418. *Turnpike*, I. 1. 710. *Bankrupt*, II.
19. "Nominated by the meeting," 15. *Vestry*, I.
20. "More in the pound," 710. *Bankrupt*, II.
21. "Office," 9. *Statute*, LI. 4.
22. "Otherwise shall be of no force and validity," where there are several antecedents, 73. *Poor*, IV. 1.
23. "Overseers or guardians of any parish or union," 558. *Poor*, I. 1.
24. Participial allegation of time, 119. *Coroner*, I. 2.
25. "Placing out," or "putting away," 656. *Poor*, IX. 2.
26. "It was proposed," 418. *Turnpike*, I. 1.
27. "In pursuance of this act," 194. 202. n. *Certiorari*, II. 1. III.
28. "Rule of court whereby any sum of money shall be payable," 175. *Execution*, VI.
29. "Shall within &c. give information," 727. *Registration*.
30. "From time to time," 108. *Transportation*.
31. No

31. No examination "upon oath of any credible witness," 616. *Poor*, XIII. 1.

CONTEMPT.

Parliament.

CONTINUANCE.

Of customs, 819. *London*, I.

CONTRACT.

I. Generally.

1. What is a mere proposal, 418. *Turnpike*, I. 1.
2. Incidental, in conveyance, 796. *Stamp*, II.
3. Partly fraudulent, 1033. *Composition*, II. 2.
4. Under duress, 982. *Duress*, I.
5. What is either "a contract" or "evidence of a contract," 792. *Stamp*, I.

II. Statutory form, 418. *Turnpike*, I. 1.

III. Ratification by acknowledgement, 418. *Turnpike*, I. 1. 934. *Infant*.

IV. In name of agent, 589. *Agent*, III.

V. To bind firm, 959. *Partner*, I. 3.

CONTRIBUTION.

To party wall, 645. *Executor*, I.

CONVEYANCE.

- I. When unnecessary, 463. *Poor*, V. 2.
- II. Incidental contract, 796. *Stamp*, II.
- III. Reservation of easement, 759. *Easement*, II.

CONVICT.

Assignment of, 108. *Transportation*.

CONVICTION.

Appel against, 134. 139. *Notice*, III.

COPARCENER.

p. 842. *Fine*, I.

CORONER, I. 1, 2.

COPY.

I. When such as to mislead, 139. *Notice*, III. 2.

II. See also *Evidence*, IV. V. 777. *Constable*, III. 1.

CORONER.

I. Inquisition.

1. Place of taking.

It is no objection to a coroner's inquisition *super visum corporis*, that it purports to be taken in county *A.* whereas the cause of death appears by the finding to have occurred in county *B.* Admitted.

A coroner's inquisition stated that the proprietors of two locomotive engines carelessly and improperly caused and permitted them to be used on a certain railway, by means of which negligence, carelessness, and improper using, and causing, &c., the engines were propelled against each other, and a person riding on one of them was killed; that the engines were moving to and the cause of the death, and were of the value respectively of &c., and the property of &c.; and that the jury exonerate the men employed on the engines from blame.

Quære, whether, on such a finding, the engines, as having moved to the death of the party killed, are deadand?

At all events, where the facts are so stated, the Court will not quash the inquisition, entirely or in part, on the ground that, upon such inquisition, a deadand may be improperly claimed. *Regina v. Grand Junction Railway Company*, 128. n.

2. Statement of time.

A coroner's inquisition on a dead body found that, on a day and at a place named, the deceased being on board of a steam-boat then floating and being navigated in a river, by misfortune, &c., a boiler containing water, and then and there forming part of a steam-engine on board the steam-boat and attached thereto, and which boiler was then and there used in working the steam-engine for the purpose of propelling the steam-boat along the river, and was then and there heated by a fire then and there also forming part

part of the steam-engine, burst, whereby boiling water, and coals, &c., forming part of the fire, and which water and coals, &c., were then and there used in working the steam-engine, by misfortune, &c., were cast from the boiler and steam-engine upon deceased, whereby he then and there received a shock, &c., and thereby became shaken, &c., of which shock, &c., the deceased instantly died, &c.; and that the boiler and steam-engine were the cause of the death and were moving thereto, and are of the value, &c.

Inquest quashed, because no time was sufficiently laid for the time of the explosion, or for that of the death.

Quære, whether the inquisition was bad in making the steam-engine, as well as the boiler, deodand.

Quære, whether, if jurors' names be inserted at full length in the body of an inquisition, it is any objection, that some have signed the inquisition without giving their Christian names at full length, but only the initials.

Though the Court will sometimes quash an inquisition on motion, for palpable defects, the most convenient course is to put the party contesting it to demur. *Regina v. Brownlow*, 119.

3. Signatures, 119. *Antè*, 2.

II. Deodand, 119. 128. n. *Antè*, I. 1, 2.

III. Practice, 119. 128. n. *Antè*, I. 1, 2.

CORPORATION.

Municipal Corporation.

COSTS.

I. Depriving statutes.

Where the plea of Not guilty was pleaded to an action of trespass *quare clausum fregit*, omitting the words "by statute," and the plaintiff recovered a farthing damages: Held (before stat. 3 & 4 Vict. c. 24.), that he was entitled to full costs. *Jones v. Thomas*, 195.

II. Plurality of counts.

1. Where a judge is applied to on summons, under Reg. Gen. Hil. 4 W. 4., *General Rules and Regulations* 6., to strike out counts of a declaration, as founded on the same subject-matter of complaint with other counts of

the same, but allows those objected to, on the plaintiff's allegation, that he *bonâ fide* intends to establish distinct matters of complaint under each, the plaintiff is liable to loss of costs, by rule 7., even on the counts, so objected to, on which he may have succeeded. But this only where issues of fact have been tried upon the several counts respectively, on which issues, a verdict might have passed for or against the plaintiff.

Not, therefore, where, upon one of two such counts, issues of fact are tried and found for the plaintiff, and, upon the other, issues in law only are depending, and nominal damages are assessed at the trial contingently. Although the Judge, who tried the cause, certify that the plaintiff did not, *bonâ fide*, intend to establish distinct matters of complaint under the two counts. *Head v. Baldrey*, 906.

2. Where, on summons, under Reg. Gen. Hil. 4 W. 4., *General Rules and Regulations* 6., to strike out a count, as founded on the same subject-matter of complaint with other counts of the same declaration, a judge allows the count objected to, on the plaintiff's allegation that he *bonâ fide* intends to establish distinct matters of complaint under each, if the plaintiff succeeds only on the count so allowed, and the Judge at Nisi Prius certifies that it was not *bonâ fide* intended to establish distinct matters of complaint on the several counts, such plaintiff, under rule 7., is liable to pay defendant's costs of the issues found for him, and is not himself entitled to any costs of the cause.

Per Coleridge J. Except costs of a special jury, if a certificate be given for that purpose.

In such a case it is too late, after taxation of costs, to object that the judge, on the summons, had not jurisdiction to allow or disallow the counts, because they were not pleaded in apparent violation of rule 5.

If there be three counts, and, on summons, counts 1 and 2 are objected to, but allowed on the ground of plaintiff's intention to prove distinct matters of complaint on each, and plaintiff at Nisi Prius succeeds

on

on count 2, but fails on counts 1 and 3, a certificate, under rule 7, that plaintiff did not intend to prove a distinct matter of complaint in respect of either of the counts on which he has failed, is insufficient to deprive him of costs. *Dewar v. Swaby*, 915.

III. Of special jury, 913. *Anté*, II. 2.

IV. On removal of indictment, 145. *Certiorari*, IV. 3.

V. When refused, 941. *Writ of trial*.

VI. When not recoverable over, 28. *Covenant*.

CO-TENANT.

Nonjoinder of, 309. *Detinue*.

COUNT.

Plurality, 906. 913. *Costs*, II.

COUNTERPART.

Time of executing, 403. *Pleading*, III. 4.

COURT.

I. Inferior.

1. How restrained, 194. *Certiorari*, II. 1.

2. What defect in constitution a mere irregularity, 194. *Certiorari*, II. 1.

II. See *Queen's Bench*. *Insolent*.

COVENANT.

I. When not waived by conduct, 720. *Landlord and Tenant*, X. 1.

II. Not to sue, 216. *Circuity*, I.

III. Pleading and practice.

1. In assignment of lease, breach of: damages.

Plaintiff declared in covenant, reciting that P. had leased a house to defendant, and defendant had by the lease covenanted to repair; that defendant had assigned to plaintiff, with covenant that defendant had repaired according to the terms of the lease; breach, non-repair, alleging, by way of aggravation, that plaintiff had assigned to C. with a covenant, that the covenants in the lease had been performed;

CRIMINAL PLEADING, I, 1, 2.

that C. had sued plaintiff for the non-performance of the covenants in the lease, whereby plaintiff had to pay C. 120*l.* to settle the action, besides the expenses of defending it. Plea, payment of 5*l.* into Court, and no damages ultra. Replication, damages ultra. Verdict for 45*l.* damages, beyond the 5*l.*

On motion by defendant for a new trial, on the ground that plaintiff was not liable to C. except for his own acts, and therefore could not charge defendant with the 120*l.* or 119*l.*, the Court refused a rule, the verdict being general, and not shewing that the jury had allowed damages in respect of C.'s action, and it being defendant's duty to point out at the trial the limitation contended for.

The Court also refused to increase the damages by 119*l.*, which was proved to have been expended in defending the action against C., since the damages recovered by C., exceeded the sum given in the present action, and must therefore in part have been attributable to plaintiff's own acts; so that the costs of defence did not appear to be the necessary consequence of defendant's breach of covenant. *Short v. Kelway*, 28.

2. Time of pointing out limitation, 28. *Anté*, 1.

3. Verdict how constructed, 28. *Anté*, 1.

4. Costs when not recoverable as damages, 28. *Anté*, 1.

COVERTURE.

Baron and Feme.

CRIMINAL INFORMATION.

p. 587. *Assault*, II.

CRIMINAL LAW.

Indictable offences: disobedience of statute, 737. *Registration*.

CRIMINAL PLEADING.

I. 1. Allegation of time, 119. *Coroner*, I. 2.

2. Coroner's inquisition. *Coroner*, I.

3. Participial

3. Participial allegation, 119. *Coroner*, I. 2.

II. Indictments.

- For refusing to give information, 738. n. *Registration*.

CROSS EXAMINATION.

- p. 803. *Witness*, II. 1.

CROWN PRACTICE.

Practice, (*Crown*).

CUSTODY.

- I. Of documents, 98. *Evidence*, V.
II. Wrongful detainer in, 98. *Evidence*, V.

CUSTOM.

- I. Effect, and admissibility in evidence.
1. To explain written contract, 589. *Agent*, III.
2. As explanatory of written instructions.

Defendant, a corn merchant in *Ireland*, sent written instructions to plaintiff, a corn factor and *del credere* agent of defendant in *London*, to sell oats of a certain quality at a certain price on his (defendant's) account. Plaintiff sold them, as described by defendant, in his own name. The oats proved to be inferior quality; and plaintiff was obliged to pay to the vendee the difference in value. In an action to recover the difference, it was objected by defendant that plaintiff had no right to sell in his own name and thereby to incur liability: Held, that evidence was admissible for the plaintiff to shew that, by the custom of the *London* corn trade, a factor was warranted by such instructions in selling in his own name. *Johnston v. Osborne*, 549.

3. Under traverse of a right, *Magor v. Chadwick*, 572. n.
4. As affecting acquirement of right to easement, 571. *Watercourse*.
II. Evidence of discontinuance, 819. *London*, I.
III. Verdict as to existence and discontinuance, 819. *London*, I.

IV. Particular customs.

1. Of *London*, 326. 549. 819. *Market overt*. *Ante*, I. 2. *London*, I.
2. Of payment to factor, *Heisch v. Carrington*, 555. n.
3. Of stannaries, 677. *Poor*, V. 3.

DAMAGES.

I. Generally.

1. Prospective, 801. *Case*, II. 5.
2. On wrongful dismissal, 798. *Master and Servant*, V.
3. Costs of resisting action, 28. *Covenant*, III. 1.

II. Pleading and practice.

1. Hypothetical averment, 816. *Pleading*, I.
2. General, 28. *Covenant*, III. 1. 179. *Foreign Judgment*. 186. *Slander*, II.

DATE.

- I. Want of, 934. *Infant*.
II. Of deed, inference from, *Fryer v. Coombs*, 407.

DE INJURIA.

Replication, II.

DEBT.

I. Generally.

1. Illegal, 966. *Gaming*.
2. Forfeiture, 710. *Bankrupt*, II.
3. Petitioning creditor's, 373. *Bankrupt*, I.

II. Action of.

1. On bills and notes, 702. *Bills*. I. 2.
2. By assignee of reversion, 403. *Pleading*, III. 4.
3. For rent, against administrator, 645. *Executor*, I.

DEBTOR AND CREDITOR.

- I. *Insolvent*.
II. Refusal of tender, 98. *Evidence*, V.

DECLARATION.

I. In pleading.

1. Duty inferred differing from that alleged, 223. *Canal*, IV.
2. Constructive

1058 DECLARATION, I. 2—5.—III.

2. Constructive breach, 223. *Canal*, IV.

3. Number of counts, 906. 913. *Costs*, II.

4. Against officer for detaining treasure after promise to give it up on reduced poundage. *Dewar v. Swabey*, 913. n.

5. Qui tam, 838. *Coals*.

II. Of witness, 805. *Witness*, II. 1.

III. Verification of, under 3 & 4 Vict. c. 9. s. 1., 297. *Parliament*, III.

DEED.

I. Not waived by parol, 720. *Landlord and Tenant*, X. 1.

II. Working by estoppel, 307. *Mortgage*, I.

III. Inference from date. *Fryer v. Coombs*, 407.

DEFENCE.

Costs when not recoverable over, 28. *Covenant*, III. 1.

DEL CREDERE.

Agent.

DELIVERY.

On board a general ship, 888. *Shipping*, I.

DEMAND.

Previous to distress, 995. *Land Tax*.

DEMISE.

Joint and several, 842. *Fine* I.

DEMURRER.

I. Statement of objections in margin. *Frend v. Butterfield*, 838.

II. Divisibility, 411. *Consideration*, I. 1.

III. Effect on questions as to plurality of counts, 906. *Costs*, II. 1.

IV. Nonsuit on, 244. *Writ of right*.

V. Judgment, when not a final bar, 244. *Writ of right*.

DEVISE, I. 1—3. II.

DEODAND.

pp. 119. 128 n. *Coroner*, I.

DEPOSIT.

From whom recoverable, 926. *Auction*.

DEPOSITION.

p. 807. *Evidence*, III. 5.

DEPUTY.

Evidence to charge principal, 813. *Marshall*, I.

DESCRIPTION.

Words of, 759. *Easement*, II.

DETAINDER.

After tender, 98. *Evidence*, V.

DETINUE.

In Detinue, upon issue joined on a plea denying property in the plaintiff, it is no defence that there are other persons, co-tenants with the plaintiff, who are not joined in the action. *Broadbent v. Ledward*, 209.

DEVIATION.

From style of firm, 539. *Bills*, II.

DEVISE.

I. Construction generally.

1. Reddendo singula singulis, 188. *Post*, V. 2.

2. By transposition, 431. *Post*, IV.

3. Descriptio personæ or condition subsequent, 431. *Post*, IV.

II. What right of entry devisable.

In 1799, *D.*, *M.*, and *A.*, being entitled to a remainder in fee, as tenants in common, of lands then held by a tenant for life, *D.* and the tenant for life conveyed the third, in which *D.* had the remainder, to *C.*, who thereupon entered into possession of the whole. In 1800 the tenant for life died,

died, *A.* having died before. The heir at law of *A.* filed a bill in Chancery, in respect of the land, against *C.* In 1835, while the proceedings were going on, the said heir at law died, having devised to *J.* all his lands &c., whether in his own possession or that of others, as far as he lawfully could, specifying those which he was seeking to recover from *C.* In 1836, the deviser's heir at law brought ejectment against *C.* for *A.*'s third part.

Held that, under sects. 2 and 12 of stat. 3 & 4 *W. 4. c. 27.*, the defendant's possession could not be held to have been ever that of the other tenants in common; for that sect. 12 made the possession of tenants in common separate from the commencement of the tenancy in common, and not merely from the time of the act passing.

That, therefore, sect. 2 would have barred the lessor of the plaintiff; but

That his right was saved by sect. 15, the ejectment having been brought within five years of the passing of the act, and the possession of *C.* not being adverse to the other tenants in common within the meaning of that section.

But that the devise of 1835 (though made before sect. 3 of stat. 7 *W. 4. & 1 Vict. c. 26.* came into operation), defeated the claim of the lessor of the plaintiff as heir at law to the deviser. For that the deviser's right was more than such a mere right of entry as was then not devisable, he having never been disseised, and having a right which enabled him to devise, both before and since stat. 3 & 4 *W. 4. c. 27. ss. 2, 12, 15.*

In error on a bill of exceptions, the record stated the exceptions to have been made after the verdict was found. The Court (upon the statement of the judge who tried the cause, and the admission of counsel), amended the record in this respect. *Culley v. Doe dem. Taylerson*, 1008.

III. What words pass the fee.

A., seised of lands in fee, devised (before 1st January 1838) as follows: "I give and bequeath to *Mary*, my wife, all my lands, messuages, and tenements, by her freely to be possessed and enjoyed, with all my property whatsoever." No mention was made

of personality in the will: nor did it appear whether the deviser had any.

Held, that the wife took a fee in the realty. *Doe dem. Booley v. Roberts*, 1000.

IV. What words pass an estate tail.

A devise to *A.* and his heir male living to attain the age of twenty-one, and, in case of no such heir male, remainder over, may give a vested estate tail to *A.* where an intention clearly appears to give him an interest beyond an estate for life.

Therefore, where testator, being seised of lands in fee, devised them to his sister for her life, remainder to her son *James*, "and his heir male living to attain the age of twenty-one," and in case of no such heir male, then to such issue female, the sum of 200*l.* to be divided between them, share and share alike; "and in case no such male or female living, then the said 200*l.* to the children of his said sister; and the inheritance of the said estate, for want of such male issue as aforesaid, to redound to my heir male," &c.: Held, that *James* took a vested estate tail; that the words "living to attain," &c., were not part of a *descriptio personæ* or a condition precedent, but a condition subsequent, defeating the estate tail if no such heir male lived to twenty-one. *Doe dem. Tremewen v. Permewen*, 451.

V. Legal estate.

1. What words of termor pass the term, 842. *Fine*, I.

2. When it passes with the beneficial interest.

Testator devised the manor of *A.*, and also a mansion house, to trustees, in trust to permit and suffer his wife, in case she should wish so to do, to occupy the same, and to receive the rents and profits thereof, until his son was of age, provided she remained unmarried; and, on the son attaining twenty-one, then in trust to release, convey, and assure the manor and mansion to the son in fee: provided that in case the wife married again, or should not wish to reside in the mansion, the trustees should let the mansion until the son attained twenty-one.

Held that, although the trustees must

must take the legal estate in order to convey to the son when of age, that alone would not prevent the widow from taking the legal estate in the mean time.

And, that whatever might be the construction of the will as to the *mansion*, the legal estate in the *manor* vested in the widow until the son attained twenty-one; because the permission to occupy, and the directions as to letting, applied to the mansion only and not to the manor. *Doe dem. Noble v. Bolton*, 188.

DIRECTION.

- I. Of judge. *Judge*.
- II. Of writ of mandamus, *Regina v. St. Pancras Vestrymen, &c.*, 27. n.

DISABILITIES.

- p. 842. *Fine*, I.

DISCHARGE.

- pp. 101. 1027. *Insolvent*.

DISSEISIN.

- I. By election, 842. *Fine*, I.
- II. As distinguished from holding over, 1009. *Devise*, II.

DISTRESS.

- I. Excessive, 643. *Plea*, II. 3. 982. *Duress*, I.
- II. Illegal, 993. *Land-tax*.
- III. Improper demand, 993. *Land-tax*.
- IV. See also 38. *Poor*, IV. 2. 382. *Suwers*, I.

DIVERSION.

- p. 418. *Turnpike*.

DIVISIBILITY.

- I. Of demurrer, 411. *Consideration*, I. 1.
- II. Of demand on a bill, 1033. *Insolvent*, IV.
- III. See also 1033. *Composition*, II. 2.

DUTY, I.—III.

DIVISION.

- p. 15. *Vestry*, I.

DUPLICITY.

- In pleading. *Pleading*, XVIII.

DURESS.

- I. In debt, the declaration stated that, arrears of rent being due from defendant to plaintiff, and plaintiff having distrained for the arrears, defendant, by writing, in consideration of plaintiff withdrawing the distress, undertook that he would pay the arrears, and in default of his so doing, plaintiff might take steps to recover them; that plaintiff did withdraw the distress, but defendant paid only a part of the arrears.

Plea. That plaintiff had distrained for more than was due, the sum paid by defendant being all that was in arrear, and that plaintiff menaced, and was about, to sell the distress, unless defendant made the agreement, which defendant therefore made. Held bad, upon motion for judgment non obstante veredicto: duress of goods not being a ground for avoiding a written agreement.

Defendant also pleaded that no part of the arrears agreed to be paid was due, except the sum paid by defendant, and that, except in respect of so much, there was no consideration for the agreement. Held bad, on motion for judgment non obstante veredicto, there being a lawful consideration (whether the larger or smaller sum were due), the adequacy of which could not be discussed. *Steele v. Beale*, 983.

- II. On sheriff, 253. *Parliament*, I.

DUTY.

- I. Of sheriff on executions, 253. *Parliament*, I.
- II. Of canal company to remove obstructions, 223. *Canal*, IV.
- III. Of constable, 856. *Constable*, I.

EASEMENT.

EASEMENT.

I. Nature.

1. As distinguished from occupation, 465. *Poor*, V. 2.
2. Prescriptive. *Prescription*.
3. In artificial watercourse, 571. *Watercourse*.

II. Alteration in dominant tenement.

In trespass *quare clausum fregit*, it appeared that *B.*, being owner of the locus in quo, and also of certain other land, with houses, and a stable, loft, and chaise house, conveyed to *A.* a part of the premises, consisting of a house and land comprehending the locus in quo, reserving to himself, his heirs, &c., occupiers for the time being of a messuage (not conveyed) *a right of way and passage* over the locus in quo to a stable and loft over the same, and the space or opening under the loft and then used as a woodhouse, and to the chaisehouse standing on the side of the locus in quo (the stable, loft, woodhouse, and chaisehouse not being conveyed), and also the use of the locus in quo in common with *A.*, his heirs, &c., and their tenants for the time being; it being expressed to be the intent of the parties that the whole of the yard comprehending the locus in quo should lie open and undivided, as the same then was, and be used in common by the occupiers of both messuages as the tenants thereof had been accustomed thereto to use them.

Afterwards *B.* built a cottage on the site of the opening under the loft. Held,

1. That the reservation of the use of the locus in quo did not authorise *B.* to use it for the purpose of passing to the cottage.
2. That the reservation of the right of way was not limited to a right of passage to the space so long as it was used as a woodhouse; but gave a way generally to the space so described, while it was open.

3. But that *B.* was not entitled to use that way for the purpose of passing to a newly erected cottage on that space.

Defendant pleaded a justification, under the use of the right of passing
Vol. XI.

to the stable, loft, and chaisehouse. Plaintiff new assigned, that defendant had converted the loft and opening into the cottage, and ceased to use it as a woodhouse, and passed to the cottage, and broke &c., for other purposes than in the plea mentioned. To which defendant pleaded that such passing was done for the purposes mentioned in the reservation, and as the tenants of the messuage not conveyed had been accustomed to use the locus in quo, *without this*, that defendant committed the trespasses newly assigned in manner &c. Held,

1. That the facts proved supported the new assignment.

2. That, even if the facts had justified the use described in the new assignment, defendant could not have had the verdict, inasmuch as the plea to the new assignment amounted only to Not guilty, and not to a justification. *Allan v. Gomme*, 759.

III. Pleading, 759. *Antè*, II.IV. Witness, 789. *Prescription*, II.

EAVES.

p. 40. *Case*, II. 1.

ECCLESIASTICAL COURT.

Remedy for erroneous judgment, 743. *Prohibition*.

EJECTMENT.

I. Generally.

1. By second mortgagee, 307. *Mortgage*, I.
2. Founded on entry to avoid a fine, 842. *Fine*, I.
3. By termor of outstanding term, 842. *Fine*, I.
4. Between parceners, 842. *Fine*, I.
5. Between tenants in common, 1008. *Devic*, II.

II. Demises.

Joint, not supported as several, 842. *Fine*, I.

III. Letting in to defend: how late, 333. *Post*, IV. 1.

IV. Judgment against the casual ejector.

1. At how late a period set aside.

After judgment signed against the casual ejector, and writ of possession executed, a judge at Chambers may, if satisfied as to facts, direct the judgment and subsequent proceedings to be set aside on payment of costs, and a party let in to defend as tenant. As where the attorney for such party was duly instructed to appear, but, through inadvertence, suffered the time to expire without appearing.

Although the case set up by such party is that he has been in possession throughout. *Doe dem. Mullarky v. Roe*, 335.

2. On what grounds set aside, *Antè*, 1.3. Jurisdiction at chambers, *Antè*, 1.

V. Evidence.

1. Competency of second mortgagee, 786. *Witness*.2. Of ouster, 1008. *Devise*, II.3. Estoppel. *Estoppel*.

ELECTION.

I. Of public officers.

1. Decisions of returning officer, 15. *Vestry*, I.2. Proper mode of ascertaining numbers, 15. *Vestry*, I.3. When set aside for mala fides of returning officer, 15. *Vestry*, I.4. Remedy by mandamus, 15. *Vestry*, I.5. When not tried on affidavit, 508. *Quo Warranto*, VI. 1.6. See also *London*, I. *Municipal Corporation*.

II. Election by a party.

1. Of remedy, 587. *Assault*, II.2. By acquiescence in order being made, 913. *Costs*, II. 2.3. Disseisin by, 842. *Fine*, I.4. To treat term as not forfeited, 842. *Fine*, I.

ENJOYMENT.

User.

ENROLMENT.

When not compelled by mandamus, 316. *Mandamus*, III. 2.

ENTRY.

pp. 44. *Pleading*, III. 1. 842. *Fine*, I. 1008. *Devise*, II.

ESCAPE.

p. 829. *Attorney*, II. 1027. *Insolvent*, IV.

ESTATE.

Devise. *Legal estate*.

ESTOPPEL.

I. When a deed shall not work by, 307. *Mortgage*, I.

II. By record.

1. By verdict &c. on new assignment, 665. *Way*, II.2. By fine and nonclaim, 842. *Fine*, I.3. By judgment for gaming debt, 966. *Gaming*.

III. By conduct.

1. Laches. *Laches*.2. Own wrong, 645. *Executor*, I.3. When it does not cure a defective notice, 720. *Landlord and Tenant*, X. 1.4. By acting as if satisfied with copy instead of original, 777. *Constable*, III. 1.

III. From disputing landlord's title.

1. Qualification to the rule, 307. *Mortgage*, I.2. As against second mortgagee, 307. *Mortgage*, I.3. Effect of assignment of reversion, 307. *Mortgage*, I.4. Notwithstanding landlord's own case shews him to have only an equitable estate, 335. *Landlord and Tenant*, IX. 2.5. Though receipts signed in special character. *Dolby v. Iles*, 335.

EVIDENCE.

I. When required and from whom.

1. Affidavit of identity, 159. *Certiorari*, I. 2.

2. To shew that shares in a company include

include an interest in land, 205. *Statute*, XII. 1.

3. To charge principal with acts of deputy, 813. *Marshal*, I.
4. From party within whose knowledge &c., 934. *Infant*.
5. On issue as to infancy, 934. *Infant*.

II. Documentary generally.

1. Preliminary proof, 98. *Post*, V.
2. Impeaching record by extrinsic evidence, 194. *Certiorari*, II. 1.
3. Stamp. *Stamp*.
4. Original when not dispensed with, 805. *Post*, IV.
5. Handwriting : comparison on cross-examination.

On an issue as to defendant's signature, witnesses were called for him who deposed that they knew his handwriting, and did not believe the signature to be his. Plaintiff proposed to ask each witness whether a paper, placed on the witness-box, was signed by defendant, purposing, by such inquiry, to test the knowledge of the witnesses by their agreement or disagreement. The paper was not in evidence for any other purpose : Held, that such inquiry was not allowable.

Per Lord Denman C. J. The objection would not have been removed by independent proof that the paper proposed to be laid before the witnesses was in fact written by defendant. *Griffiths v. Ivery*, 322.

6. Proper custody : vesting order, 98. *Post*, V.

III. Particular documents.

1. Inquisitions of compensation juries, 463. *Poor*, V. 2.
2. Acknowledgment of tenancy, 792. *Stamp*, I.
3. Depositions.

On issue joined upon the plea of not possessed, in trespass quare clausum fregit, defendant may use as evidence the deposition of a witness, formerly called by plaintiff to prove his possession in a proceeding before justices for an alleged trespass on the same close. It makes no difference that the witness is still alive. *Cole v. Hadley*, 807.

IV. Copies generally : admission as.

Under *Reg. Gen. Hil.* 4. W. 4. 20., where of two defendants, G. and L., L. had suffered judgment by default, a judge's order of admission was made on notice that defendant G. proposed to adduce the documents specified (which might be inspected), and that plaintiff would be required to admit that they were copies of, or extracts from, original documents (as they purported to be); and the documents were described as "copies of, or extracts from, letter from plaintiff to defendant, dated &c."

Held, that this did not authorise the giving in evidence such copy, without further proof of the original, though notice had been given to produce, it not being proved that plaintiff had the original. *Sharpe v. Lamb*, 805.

V. Official copies : vesting order.

In an action for maliciously, and without reasonable cause, refusing to accept a tender of debt and costs, for which plaintiff was in execution at defendant's suit, the defendant may give evidence of probable cause, under the plea of Not guilty.

An order of the Insolvent Debtors' Court under 1 & 2 Vict. c. 110. ss. 36, 37., vesting the estate of an insolvent in the provisional assignee, is sufficiently proved by a copy on paper, sealed with the seal of the court, and certified by the provisional assignee. It is not necessary to shew, more particularly, that such assignee is the officer in whose custody the order is; or to prove the creditor's petition on which it was granted. *Hounsfield v. Drury*, 98.

VI. Parol explanation of written evidence.

1. By local custom, 549. *Custom*, I. 2. 589. *Agent*, III.
2. To shew that a party acted only as agent, 589. *Agent*, III.
3. To shew the construction put upon a notice by the party receiving it, 720. *Landlord and Tenant*, X. 1.
4. Of ratification of promise, 934. *Infant*.

VII. Declarations.

Contradiction as to, 805. *Witness*, II. 1.

VIII. Admissions.

1. By laches, 66. *Statute*, LI. 5.
2. By pauper, 607. *Poor*, XIII. 1.
3. By production of document, 792. *Stamp*, I.
4. Of copy, under judge's order, 805. *Ante*, IV.
5. By witness called on a former proceeding, 807. *Ante*, III. 5.

IX. Hearsay, 607. 616. *Poor*, XIII.

X. With reference to the state of the pleadings.

1. Under the general issue, 98. *Ante*, V. 438. *Consideration*, I. 2.
2. Under general issue by statute, 631. 643. *Plea*, II.
3. Under plea that original defendant had no goods, 539. *Sheriff*, I. 2.
4. Under traverse of right to enjoy easement. *Magor v. Chadwick*, 572. n.
5. Under traverse of promise to pay modo et forma, 661. *Pleading*, XI. 1.
6. Application of, on plea justifying deviation to new assignment extra viam, 665. *Way*, II.
7. To support new assignment, 759. *Easement*, II.

XI. Relevancy: collateral circumstances.

Assumpsit by indorsee against acceptor of a bill. Plea, non accept: defence, that the alleged acceptance was a forgery. Defendant offered evidence that a collection of bills, having on them forgeries of his signature, had been in plaintiff's possession, and that some of such bills had been circulated by him.

Held inadmissible, unless distinct proof were given that the bill on which the action was brought had formed part of the collection. *Griffiths v. Payne*, 131.

XII. In particular proceedings.

Hearing before justices, 607. 616. *Poor*, XIII.

EXAMINATIONS.

pp. 607. 616. *Poor*, XIII.

EXECUTED CONTRACT.

Licence, 34. *Licence*, I.

EXECUTION.

I. Priority, 529. 539. *Sheriff*, I. 2. VIII. 1.

II. Authority to discharge, 829. *Attorney*, II.

III. When not defeated by resolutions of a house of parliament, or conflicting claims in another court, 253. *Parliament*, I.

IV. Setting aside judgment after, 533. *Ejectment*, IV. 1.

V. In action against public officer, 520. *Partner*, III. 1.

VI. By virtue of a rule of court.

Under an agreement of reference, a sum was awarded to be paid by plaintiff to defendant; and afterwards the agreement was made a rule of Court.

Held, that the plaintiff could not, by virtue of the rule of Court, issue execution for the sum, under stat. 1 & 3 Vict. c. 110. s. 18., that clause being applicable for such purpose only where the money payable by the rule is expressed in the rule itself. *Jones v. Williams*, 175.

EXECUTORS AND ADMINISTRATORS.

I. Liabilities: rent.

In debt for rent against an administrator, as assignee of the intestate, defendant pleaded, in discharge of his liability otherwise than as administrator, that the intestate underlet, for an unexpired term, to a tenant who had become insolvent and unable to pay rent; that the premises were of less value than the rent, viz. of the value of a certain sum, part of which defendant had paid to plaintiff, and part towards the expense of a party wall under the building act (14 G. 3. c. 78.); that, before the rent became due, defendant offered to surrender all his interest in the premises to plaintiff, who refused to accept them, and that he had fully administered &c.

Replication, that the premises were of more value than the sum mentioned in the plea, viz. of the value of the rent; and that defendant did not offer to surrender &c. Issue thereon.

Held,

Held, that the real value of the premises, as against defendant, must be taken to be that which it would have been if he had not himself committed a breach of a covenant to repair in the original lease :

Held also, that the value, as between plaintiff and defendant, was not affected by the insolvency of the under tenant, whose lease also contained a covenant to repair, with a proviso of re-entry for breach and for nonpayment of rent. *Hornidge v. Wilson*, 645.

II. Assent to bequest, 842. *Fine*, I.

III. Pleading, 645. *Ante*, I.

FACTOR.

Agent.

FALSE IMPRISONMENT.

p. 777. *Constable*, III. I.

FATHER.

Registration of birth, 727. *Registration*.

FEE.

1000. *Devise*, III.

FELONY.

I. In obstructing mine, 483. *Malicious Prosecution*, II.

II. See also 380. *Slander*, I.

FEME.

Baron and Feme.

FEOFFMENT.

By termor, 842. *Fine*, I.

FIERI FACIAS.

I. By virtue of a rule of court, 175. *Execution*, VI.

II. Effect of delivery of warrant to deputy sheriff, 859. *Insolvent*, III. 3.

III. See also 529. 826. *Sheriff*, V. VIII. 1.

FINE.

M., after a devise of his property real and personal to *P.*, purchased lands in fee, and procured an assignment of an outstanding term of years to *P.* as his trustee. On the death of *M.* without republishing his will, a moiety of the fee descended to *P.*'s wife as coparcener with others ; but *P.*, thinking himself entitled under the will, entered into, and took the profits of, the whole to his own use, and afterwards joined his wife in a feoffment, and fine sur cognizance de droit come ceo, with proclamations : Held,

That the term was not merged by the seisin of *P.* in right of his wife :

That the feoffment and fine were not void, but operated as a disseisin and forfeiture of the term, of which advantage might be taken by entry within five years, either after forfeiture or after the expiration of the term ;

That, in the mean time, the term might be treated as still subsisting for the purpose of entitling a plaintiff in ejectment to recover on a demise by *P.*'s personal representative.

A joint demise in ejectment cannot be supported as the several demise of one or more of the lessors whose title is proved at the trial : therefore, where the demise is by one parcener jointly with another parcener and her husband, whose title, *jure uxoris*, is barred by fine and nonclaim, there cannot be a verdict for the plaintiff.

Per *Patteson J.* An entry to avoid a fine with proclamations, though not authorised by the party in whose behalf it was made, is sufficiently ratified by an action of ejectment founded on it. *Doe dem. Blight v. Pett*, 842.

II. *Amercement*.

FOREIGN JUDGMENT.

Defence available : want of process.

In an action of debt on a judgment in the Court of C. P. in *Ireland*, the defendant, though he cannot contest the merits of the action or the propriety of the decision, may shew that the court had not properly jurisdiction as to the defendant under the circumstances. Therefore, where the defend-

ant pleaded to such action that he was never arrested upon, or served with, nor at any time had notice of, any process of the Court at the suit of plaintiff for the cause of action on which the judgment was obtained, nor ever appeared in the action: Held, that the plea was a good defence: Held also, on special demurrer, that a replication alleging that, before obtaining the judgment, defendant had notice of a writ of summons, issuing out of the said Court, "for the cause of action on which the judgment was so obtained," was bad.

The declaration contained counts, 1. for 139*l.*, stated to be due on a judgment; 2. for 180*l.* rent. On the first count the pleadings led to an issue in law. To the second, the defendant pleaded part payment, and, issue being joined on that allegation, a jury was impanelled to try it, and to assess contingent damages on the issue in law. On the second issue there appeared to be a balance of 106*l.* due to the plaintiff. The jury found a general verdict for 139*l.* Afterwards the issue in law was decided in favour of the defendant.

Held, that the Judge might amend the verdict by his notes, and direct it to be entered for the plaintiff, on the second count only, for 106*l.* *Ferguson v. Mahon*, 179.

FORFEITURE.

- I. Of debt, 710. *Bankrupt*, II. 1035. *Composition*, II. 2.
- II. Of term, 842. *Fine*, I.
- III. Waiver, 411. *Consideration*, I. 1. 842. *Fine*, I.

FORGERY.

- p. 131. *Evidence*, IX.

FORM.

- I. Statutory, 418. *Turnpike*, I. 1.
- II. *Irregularity*.

FRAUD.

- I. In execution of corporate bond, 490. *Bond*, II.
- II. When it vitiates the whole, 1033. *Composition*, II. 2.

FRAUDS.

Statute of. *Statute*, XII.

GAMING.

Where the loser of money at play gave a bill for the amount to the winner, who indorsed it to an innocent party, and such indorsee commenced an action against the drawer, took a cognovit from him in the action, and proceeded to judgment (stat. 5 & 6 W. 4. c. 41. not being yet in force):

Held, that defendant could not afterwards impeach the judgment as void by stat. 16 Car. 2. c. 7. s. 3. and 9 Ann. c. 14. s. 1.; for that those clauses avoided judgments voluntarily given by the loser as security for money lost, but not a judgment obtained adversely by an innocent party, the defendant having had an opportunity of setting up the illegality of the bill as an answer to the action. But,

Held, that if the defendant could have impeached the judgment as void by the last-mentioned statutes, the Marshal of the Queen's Bench might have pleaded its nullity in an action against him for permitting the escape of such defendant when taken in execution upon the judgment.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the statutes against gaming, 16 Car. 2. c. 7. s. 3., and 9 Ann. c. 14. s. 1., avoid judgments obtained from the loser by the winner as a security for money lost, but not judgments which the winner or a third party claiming through him recovered against the loser by action. *Lane v. Chapman*, 966.

GAOL.

- I. Contract with borough, 144. *Certiorari*, I. 1.
- II. Effect of borough never having had, 144. *Certiorari*, I. 1.

GENERAL ISSUE.

Plea, II. 98. *Evidence*, V.

GOODS.

GOODS.

- I. Licence to remove, 34. *Licence*, I.
- II. Duress of, 982. *Duress*, I.

GOVERNOR.

Of penal colony, 108. *Transportation*.

GUARDIAN.

Reimbursement of voluntary, 458. *Consideration*, I. 2.

GROUND OF APPEAL.

pp. 87. 90. *Poor*, XIV.

HABEAS CORPUS.

- I. Ad subjiciendum, 273. *Parliament*, II. 2.
- II. What not inquirable on affidavit, 273. *Parliament*, II. 2.

HANDWRITING.

Cross-examination, 322. *Evidence*, II. 5.

HIGHWAY.

- I. Notice of appeal against conviction, 134. *Notice*, III. I.
- II. Turnpike.

HOUSE OF COMMONS.

Parliament.

HOUSE OF CORRECTION.

Gaol.

HUSBAND AND WIFE.

Baron and Feme.

IDENTIFICATION.

When required, 159. *Certiorari*, I. 2.

IDIOT.

Lunatic.

ILLEGALITY.

- I. Of security, effect on legal debt, 710. *Bankrupt*, II. 1033. *Composition*, II. 2.
- II. When available as a defence, 966. *Gaming*.
- III. Of collateral agreement, 1033. *Composition*, II. 2.

IMPLICATION.

- I. Of consideration, from nature of instrument, 702. *Bills*, I. 2.
- II. See also *Indentment*. *Pleading*, XIX.

IMPRISONMENT.

Of sheriff, 253. *Parliament*, I.

INCONSISTENCY.

In pleading, 44. *Pleading*, XVII.

INDORSEMENT.

- I. Of bill of lading, 888. *Shipping*, I.
- II. Of warrant, 777. *Constable*, III. 1.

INFANCY.

Ratification. Onus of proof.

Debt for goods sold and delivered : plea, infancy : replication, that defendant ratified the contract, in writing, after coming of age. Issue thereon.

Plaintiff produced the following paper, signed by defendant. "I am sorry to give you so much trouble in calling; but I am not prepared for you; but will without neglect remit you in a short time." The paper contained no address, and specified no sum : but it was proved orally that defendant delivered it to plaintiff's agent, on being pressed for the debt, the amount of which was also proved by oral evidence. Held sufficient to satisfy stat. 9 G. 4. c. 14. s. 5.

No evidence was given to shew whether defendant was of age or not when he delivered the paper : Held, that the plaintiff must recover, the defendant, if he relied on his infancy at the time, being bound to prove it. *Hartley v. Wharton*, 934.

INFERIOR COURT.

Court.

INFORMALITY.

Irregularity.

INFORMATION.

Quo Warranto. Criminal Information.

INJURY.

Permanent, 301. *Case, II. 5.*

INQUISITION.

- I. Coroner's, 119. 128. n. *Coroner, I.*
- II. Railway, 194. 202 n. *Certiorari, II. 1. III.*
- III. As evidence of title, 463. *Poor, V. 2.*

INSANE PERSON.

Lunatic.

INSOLVENT.

I. Generally.

1. Evasion not favoured, 101. *Post, III. 1.*
2. Insolvency of undertenant, 645. *Executor, I.*

II. Charge in custody.

A writ of *capias* may issue, without a Judge's order or a writ of summons, against a prisoner remanded by the Insolvent Debtor's Court, under 1 & 2 *Vict. c. 110. s. 85. Growcock v. Waller, 165.*

III. Vesting order.

1. Tender after.

Where a creditor, on his petition to the Insolvent Debtors' Court under stat. 1 & 2 *Vict. c. 110. s. 36.*, has obtained an order (*s. 37.*), vesting the estate of his insolvent debtor in the provisional assignee, such creditor is not bound, on the debtor afterwards tendering the amount of debt and costs, to assent to his discharge from custody; nor will this Court order such discharge as to the creditor's action, on affidavit of

INTERRUPTION.

tender and refusal. *Drury v. Hamfield, 101.*

2. Proof of, 93. *Evidence, V.*

3. Effect as to judgment creditor.

Defendant having obtained a judgment against *T.*, lodged a *fi. fa.* with the deputy (under stat. 3 & 4 *W. 1. c. 42. s. 20.*) of the sheriff, and the deputy immediately issued a warrant to an officer. Afterwards, on the same day, a vesting order was made (under stat. 1 & 2 *Vict. c. 110. s. 37.*) by the Insolvent Debtors' Court transferring the estate of *T.* The assignee under this order took possession of *T.*'s property; and afterwards the sheriff's officer seized it.

Held, that the seizure was proper. *Woodland v. Fuller, 859.*

IV. New securities.

The drawer of a bill of exchange, accepted by defendant for a sum consisting partly of a debt from which he had been discharged under the Insolvent Debtors' Act, 7 *G. 4. c. 57.*, and partly of a new debt, is entitled to recover on the bill as to amount of the new debt: Therefore a plea of discharge under sect. 61 of that act, as to the old debt, is no answer to the whole of a count on such a bill. *Skerrins v. Thompson, 1027.*

V. Court.

Effect of a rule pending there on a rule nisi previously obtained in *Q. B.*, 253. *Parliament, I.*

INTENDMENT.

When refused, 373. *Bankrupt, I.*

INTENTION.

p. 31. *Bills, III. 589. Agent, III. 939. Partner, I. 5.*

INTEREST.

- I. In writs of *ca. sa.*, 602. *Reg. Gen. II. Witness.*

INTERRUPTION.

p. 688. *Prescription, I.*

INTRUSION.

INTRUSION.

p. 508. *Quo warranto*, VI. 1.

IRREGULARITY.

On taking railway inquisition, 194.
202. n. *Certiorari*, II. 1. III.

ISSUE.

- I. Material or immaterial, 453. *Accord*, 661. *Pleading*.
- II. General. *Plea*, II.
- III. Divisibility, 411. *Consideration*, I. 1.
- IV. When not tried unless pleadings amended, 665. *Way*, II.

JOINDER.

- I. Of counts, 798. *Master*, V.
- II. Of parties, 209. *Detinue*. 995. *Land Tax*.

JOINT-STOCK.

Company.

JUDGE.

- I. Order, 167. *Plea*, V. 915. *Costs*, II. 2.
- II. At chambers.
Jurisdiction to set aside judgment, 333. *Ejectment*, IV. 1.
- III. Question for.
In case, 485. *Malicious Prosecutions*, II.
- IV. Power to amend.
Entry of verdict, 179. *Foreign Judgment*, 186. *Slander*, II.
- V. Direction.
 1. As to authority of partner, 339. *Bills*, II.
 2. As to privileged communication, 380. *Slander*, I.
 3. As to specific circumstances, 529. *Malicious Prosecution*, I.
 4. Whether a publication be libellous, 920. *Libel*, II.
- VI. Certificate.
Against plurality of counts, 906. 913. *Costs*, II. 2.

JUDGMENT.

- I. When not a final bar.
 1. On demurrer to count, 244. *Writ of right*.
 2. On motion to take return off the file, 955. *Mandamus*, IV. 2.
- II. When a final bar.
 1. Order of removal quashed, 624. n. *Poor*, X.
 2. Adverse judgment for gaming debt, 966. *Gaming*.
- III. Irish. *Foreign Judgment*.
- IV. Against casual ejector, 333. *Ejectment*, IV. 1.
- V. Arrest of: venire de novo instead, 186. *Slander*, II.
- VI. Setting aside, 333. *Ejectment*, IV. 1.

JURISDICTION.

- I. How far essential.
 1. To justification, 777. *Constable*, III. 1.
 2. Want of in foreign court, 179. *Foreign Judgment*.
 3. On face of order, 373. *Bankrupt*, I.
- II. Not created by consent, 941. *Writ of trial*.
- III. Effect of irregularity, 194. 202. n. *Certiorari*, II. 1. III.
- IV. In particular instances.
 1. At chambers, 333. *Ejectment*, IV. 1.
 2. On summons to strike out counts, 913. *Costs*, II. 2.
 3. Of Lords of Treasury, 9. *Statute*, LI. 4.
 4. Of recorder, 170. *Poor*, XVIII.
 5. Under railway acts, 194. 202. n. *Certiorari*, II. 1. 3.

JUSTICE OF THE PEACE.

- I. Particular acts of.
 1. Contract for borough prisoners in county gaol, 144. *Certiorari*, I. 1.
 2. Signature of convictions, 139. *Notice*, III. 2.

3. Supersedeas

3. Supersedeas of order, 809. *Poor*, XVI.

II. Liabilities.

1. When not rateable, 57. *Poor*, VI. 1.

2. When the party by whose act a person is grieved, 134. *Notice*, III. 1.

III. Notice &c. : to how many, 134. 139. *Notice*, III.

IV. Justices' clerk, 9. *Statute*, LI. 4.

JURY.

I. Question for.

1. Existence of custom, 819. *London*, I.

2. Intention to be bound only in certain contingencies, 959. *Partner*, I. 3.

3. In case for libel &c., 929. *Libel*, II. 380. *Slander*, I. 483. *Malicious Prosecution*, II.

II. Costs of special, 915. *Costs*, II. 2.

LACHES.

I. At trial, 28. *Covenant*, III. 1.

II. In not determining claim for compensation, 66. *Statute*, LI. 5.

III. Of sheriff, 253. *Parliament*, I.

LAND.

I. Interest in, 205. *Statute*, XII. 1.

II. Occupier, 677. *Poor*, V. 3.

LANDLORD AND TENANT.

I. Tenancy how created.

1. Written acknowledgement, 792. *Stamp*.

2. Agreement for lease by part only of intended lessors, 959. *Partner*, I. 3.

3. Lease and power: time of execution of counterpart, 405. *Pleading*, III. 4.

II. Landlord.

1. Meaning of the word. *Dolby v. Iles*, 335.

2. His conduct on a defective notice, 720. *Post*. X. 1.

III. Estoppel. *Estoppel*.

IV. Mortgage: effect of first and second mortgages, 307. *Mortgage*, I.

V. Rent.

1. Payment of, when no estoppel, 307. *Mortgage*, I.

2. When an estoppel, 355. *Post*. IX. 2.

3. Reservation of usual, 403. *Pleading*, III. 4.

4. When not the criterion of value, 645. *Executor*, I.

5. What a rent and not a share of produce, 677. *Poor*, V. 3.

VI. Expenses.

1. Of party wall, 645. *Executor*, I.

2. Poor-rates, 677. *Poor*, V. 3.

VII. Repairs.

Consequences of neglect, 645. *Executor*, I.

VIII. Assignment.

1. Damages on breach of covenant in, 28. *Covenant*, III. 3.

2. Assignee when not affected by the same estoppels as the assignor, 307. *Mortgage*, I.

3. Liabilities of administrator, 645. *Executor*, I.

IX. Landlord's remedies.

1. Case for injury to reversion, 40. *Case*, II. 1.

2. Though he has only an equitable estate.

A person who has occupied premises, and paid rent to the apparent proprietor as his landlord, cannot, when sued by him for the use and occupation, allege that he has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action.

Although plaintiff, at the trial, discloses that fact in proving his own case. *Dolby v. Iles*, 335.

3. Debt by assignee of reversion, 403. *Pleading*, III. 4.

4. Claim for rent under *fi. fa.*, 559. *Sheriff*, I. 2.

5. Trial before sheriff, 941. *Writ of trial*.

6. Distress. *Distress*.

X. 1. Termination: by notice.

Lease

Lease for twenty-one years from *Michaelmas* 1823, with covenant that, if the tenant should desire to determine the demise at the end of the first fourteen years, and should leave or give six calendar months' notice immediately preceding the expiration of the first fourteen years, the lease should determine.

The tenant, six months before the *June* preceding the expiration of the first fourteen years, gave notice that he should quit on the 24th *June* 1837, agreeably to the covenants of the lease.

Held, that this notice did not satisfy the covenant.

And that the jury could not be asked whether, from the landlord's conduct, as shewn in evidence, they believed that he understood the notice to refer to *Michaelmas* 1837. *Cadby v. Martinez*, 720.

2. By surrender : what contract a mere incident, 796. *Stamp*, II.

XI. Underletting : landlord when not affected, 645. *Executor*, I.

XII. Pleading.

1. General issue "by statute," 645. *Plea*, II. 3.

2. Inadequacy of value, 645. *Executor*, I.

XIII. Outstanding term. *Term*.

LAND TAX.

Plaintiff, being vicar of *E.*, and owner and occupier of the vicarial tithes, and being also occupier of the rectorial tithes, which belonged to *B.*, and on which the land tax had been redeemed, was assessed to the land tax in a gross sum for vicarial and rectorial tithes. The whole sum, up to the quarter-day last past, being demanded by defendant, who was collector, plaintiff refused to pay the sum at which the rectorial tithes had been redeemed, but paid the residue of the assessment. The collector distrained on him, under stat. 38 *G. 3. c. 5. s. 17.*, for the amount withheld. The distress warrant did not specify the property. Held,

1. That the distress was illegal, as being for a sum not due, and because the assessment should have separated the tithes belonging to different pro-

prietors, under stat. 20 *G. 3. c. 17. s. 3.*

2. That trespass lay for the distress, and that plaintiff was not bound to appeal, under sect. 8. of stat. 38 *G. 3. c. 5.*

3. That, the demand having been for the sum alleged to be due for a quarter then expired, defendant could not justify the distress by shewing that a sum was due at the expiration of the current quarter for vicarial tithes, which would cover the sum distrained for.

4. Plaintiff demanded and received a copy of the warrant : Held, that he was not bound to join, as defendants, the commissioners who issued the warrant, stat. 24 *G. 2. c. 44. s. 6.* being inapplicable, though the commissioners were also acting magistrates for the division. *Charleton v. Alway*, 993.

LARGINESS.

In pleading, 411. *Consideration*, I. 1.

LEASE.

Under power, 403. *Pleading*, III. 4.

LEGAL ESTATE.

I. Action maintained without, 355. *Landlord and Tenant*, IX. 2.

II. Under a devise to trustees, 188. *Devise*, V. 2.

III. Outstanding term. *Term*.

LEVY.

p. 529. *Sheriff*, VIII. 1. 383. *Sewers*, I.

LIBEL.

I. Stay of proceedings under stat. 3 & 4 *Vict. c. 9.*, 297. *Parliament*, III.

II. Direction of Judge.

Upon the trial of an issue of not guilty, it is no misdirection if the Judge leaves generally to the jury the question, whether the publication be libellous, without stating his own opinion as to the particular publication, or defining what generally constitutes a libel. *Baylis v. Lawrence*, 920.

LICENCE.

LICENCE.

I. Revocation.

Goods which were upon plaintiff's land were sold to defendant; by the conditions of sale to which plaintiff was a party, the buyer was to be allowed to enter and take the goods.

Held, that after the sale, plaintiff could not countermand the licence.

And, defendant having entered to take, and plaintiff having brought trespass, and defendant having pleaded leave and licence and a peaceable entry, to take, to which plaintiff replied *de injuriâ*: Held, that defendant was entitled to the verdict, though it appeared that plaintiff had, between the sale and the entry, locked the gates and forbidden defendant to enter, and defendant had broken down the gates and entered to take the goods. *Wood v. Manley*, 34.

II. To discharge prisoner in execution, 829. *Attorney*, II.

LIEN.

On consignment, 888. *Shipping*, I.

LIGHT.

p. 688. *Prescription*, I.

LIMITATION.

I. Of time of applying for mandamus, 516. *Mandamus*, III. 2.

II. In quo warranto, 518. *Quo Warranto*, V. 1.

III. Between tenants in common, 1008. *Devise*, II.

IV. Statute 3 & 4 W. 4. c. 27. ss. 14, 15. 44. *Pleading*, III. 1.

LONDON.

I. Custom as to election of aldermen.

The custom of the city of London, for the court of mayor and aldermen to examine and determine, upon petition, whether or not any person elected alderman of a ward, and returned to the said court as such alderman, be, according to their discretion and sound consciences, a fit and proper

person, duly qualified, is not abrogated by stat. 11 G. 1. c. 18., nor by the by-law of the city, 15 Ann., "for reviving the ancient manner of electing aldermen," which (after reciting that, by the ancient custom of the city, when any ward became vacant of an alderman, the inhabitants of that ward, having right to vote, were wont to choose one person only, being a citizen and freeman, to be alderman of the ward,) enacts that, for reviving that custom, and restoring to the inhabitants their ancient right of choosing one person only to be their alderman, there shall from thenceforth, in all elections of aldermen of the city, at a wardmote to be holden, for that purpose, be elected, according to the said ancient custom, only one able and sufficient citizen and freeman, to be returned to the court of mayor and aldermen, which person so elected shall be by them admitted and sworn.

A custom, proved to have existed from time immemorial till 1689, must be taken to exist still, if there be no further evidence proving or disproving its existence.

On an issue bringing into question the existence of the above custom of London, evidence was given of its exercise from an early period down to 1689; but no proof of its having been exercised, or interfered with, at any later time. The jury found, "That the custom existed to 1689."

Held, that this was a verdict for the defendants, who alleged the custom.

And that the Judge did rightly in ordering it to be so entered, and refusing to ask the jury, whether it had existed after 1689. *Scales v. Key*, 819.

II. Custom of, 326. *Market Overt*.III. Coal-vendors' act, 838. *Coals*.

LORDS OF THE TREASURY.

p. 9. *Statute*, LI. 4.

LUNATIC.

Pauper, 170. *Poor*, XVIII.

MALICE.

Disproof, 98. *Evidence*, V. 329. *Malignant Prosecution*, I.

MALICIOUS

MALICIOUS PROSECUTION.

I. Though defendant bound by recognizance.

To a declaration for maliciously, and without probable cause, procuring plaintiff to be indicted at the Central Criminal Court for felony, it is no answer that the defendant was bound over by recognizance to prosecute, if the jury believe that the defendant caused himself to be bound by making the charge maliciously, and without probable cause, before the magistrate who took the recognizance.

It is not incumbent on the Judge in such a case to call the attention of the jury specifically to the circumstance that the injury alleged in the declaration is the preferring at the sessions of the Court, a charge which is *then* maliciously made. *Dubois v. Keats*, 329.

II. Scienter.

In an action for a malicious prosecution, the question whether there be or be not reasonable or probable cause, may be entirely for the Judge, or for the jury, according to the evidence in the particular case.

When the prosecution was under stat. 7 & 8 G. 4. c. 30. s. 6., for maliciously and feloniously obstructing a mine, and plaintiff was acquitted on the ground that he committed the obstruction under a claim of right by his employer, and by such employer's direction, and, on action brought, it was proved at the trial, that there had been disputes between the employer and defendant on the subject, before the obstruction; and that defendant knew from plaintiff that the obstruction was effected in assertion of his employer's alleged right: Held, that the Judge was not justified in nonsuiting, or directing a verdict for defendant, on the ground of there being reasonable and probable cause; but that the question was for the jury. *James v. Phelps*, 483.

III. Pleading and evidence, 329. *Antè*, I.IV. Directions of judge, 329. *Antè*, I.

MANDAMUS.

I. Time of application, 316. *Post*, III. 2.

II. When the proper remedy.

To permit a councillor to act.

On an election of councillors for a ward in a borough, the presiding alderman, and two assessors, before two in the afternoon of the next day but one after the election, published (under stat. 5 & 6 W. 4. c. 76. s. 35.), a declaration containing a list of the councillors elected, which declaration included the name of *P.* After two o'clock, the alderman and assessors, on the discovery of a supposed error in counting the legal votes, signed and published a second list, omitting the name of *P.*, and substituting that of *R.* *P.* afterwards made the declarations required by stats. 9 G. 4. c. 17. s. 2., and 5 & 6 W. 4. c. 76. s. 50.; and *R.* subsequently did the same. Afterwards, upon *P.* claiming to act, the mayor and town council refused to permit him to do so, and allowed *R.* to act.

On application by *P.* for a mandamus to receive and count his vote: Held, that the office was not full of *R.*; and that the proper remedy was by mandamus; the second publication and subsequent acting by *R.* being merely void, and *P.* being in *de facto*. *Regina v. Leeds Mayor &c.*, 512.

III. When refused.

1. Where another and a better remedy.

The conservators of *Bedford Level* moved for a mandamus to landowners to amend and heighten certain banks within the *Level*, which they were liable to repair *ratione tenuræ*, and which were alleged (but not admitted) to be in a dangerous state.

Writ refused, inasmuch as stat. 15 Car. 2. c. 17. s. 5. give the conservators, within the *Level*, the authority of Commissioners of Sewers, and, therefore, they had a sufficient remedy in their own hands. *Regina v. Gamble*, 69.

2. After lapse of an unreasonable time.

A canal company were empowered by statute (10 G. 3. c. 114.) to purchase lands, or to take from unwilling owners upon making compensation. The contracts, sales, &c. were to be enrolled, with the clerk of the peace for the county, at the expense of the company;

company; true copies to be evidence in all courts. The lands were to be vested in the company upon the payment or tender of the sums contracted for or assessed as compensation.

A landowner applied for a mandamus requiring the company to enrol all contracts, &c., relating to certain lands which had been taken by them from his estate; alleging that, at a late trial between himself and the company, it had been material for him, in order to avail himself of privileges conferred by the statute, to prove that the company had taken lands from his estate, and that he had incurred great expense in procuring secondary evidence, for want of enrolment of a contract which, he was informed and believed, had been made under the circumstances in which enrolment was prescribed by the statute.

It appearing that the company had been in undisturbed possession of the lands in question for sixty-five years, the Court refused a mandamus. *Regina v. Leeds and Liverpool Canal Co.*, 316.

IV. Practice.

1. Direction of writ, *Regina v. St. Pancras Vestrymen*, &c. 27. n.
2. Traverse of the return.

Prosecutors of a mandamus moved to take return off the file, on affidavit, and on objections made against the validity of the return itself. The Court, after argument on the law and facts, ordered in general terms, that the rule should be discharged. Defendant then traversed the return. On motion to take the traverse off the file, because judgment had already been given in favour of the validity of the return,

Held, that discharging a rule under the above circumstances was not equivalent to a judgment on concilium, and that the prosecutors were entitled to traverse: the Court saying that they did not intend, on the motion, to decide upon the validity of the return in point of law. *Regina v. Payn*, 955.

3. Where the return to a mandamus contains several distinct heads of answer, the prosecutor may, by leave of the Court, traverse one or more of these, as untrue in fact, after having argued the validity of others in point of law on a concilium. *Regina v. North Midland Railway Co.*, 955. n.

MARKET OVERT.

A sale within the city of London, in an open shop, of goods usually dealt in there, is a sale in market overt, though the premises are described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within. *Lyons v. De Pass*, 326.

MAINTENANCE.

Order of, 777. *Constable*, III. 1.

MARSHAL.

I. Liability for acts of deputy.

In an action against the marshal of Q. B. for assaulting and imprisoning plaintiff, it appeared that the act was committed in alleged enforcement of the prison discipline, by a person acting as deputy marshal; but the appointment of such person was not proved, nor any recognition of him by defendant, nor any other circumstance connecting defendant with his acts.

Held, insufficient; and that evidence at least should have been given to raise a presumption that the deputy was acting under a general or particular authority from defendant. *Yorke v. Chapman*, 813.

II. See Sheriff.

MASTER AND SERVANT.

- I. 1. Damages in case for wounding servant, 301. *Case*, II. 5.

2. Evidence in case for seduction, 803. *Witness*, II. 1.

- II. Liabilities of servant to master: forfeiture, 411. *Consideration*, I. 1.

- III. Liabilities of master to servant: form of action, 798. *Post*, V.

- IV. Liabilities of servant to stranger; accord with master, 453. *Accord*.

- V. Month's warning or month's wages.

Plaintiff was hired as superintendent of works at the rate of 150 guineas a year from a day named; either party to have the option of determining the engagement by a month's notice. At the end of eighteen months plaintiff

was dismissed without notice, or cause assigned, eighteen months' wages being then due to him. A month after dismissal he brought an action, declaring specially on the agreement, and stating, as the breach, that defendant would not continue plaintiff in his employ till the expiration of such month's notice, but discharged plaintiff in the middle of a year without notice; whereby plaintiff lost all the wages, profits &c., which he might have derived from continuing in defendant's service; and was still unemployed.

Held, that the contract was for dismissal on a month's warning or a month's wages, and that, on this count, plaintiff could recover only the month's wages.

But that he might have added a common count for work and labour, and recovered under it his wages for the eighteen months. *Hartley v. Harman*, 798.

VI. Pleading, 411. *Consideration*, I. 1. 453. *Accord*.

MAYOR.

Municipal Corporations, III.

MEMORANDA.

pp. 1. 757.

MERGER.

Of term, 842. *Fine*, I.

MINE.

I. Easement acquired in adits, 571. *Watercourse*.

II. Feloniously obstructing, 483. *Malignous Prosecution*, II.

III. Rateability of rent &c., 677. *Poor*, V. 3.

MISDIRECTION.

Of judge. *Judge*.

MISTAKE.

I. Of fact, 307. *Mortgage*, I.

II. In stamped document, 31. *Bills*, III.

MORAL OBLIGATION.

pp. 411. 438. *Consideration*, I.

MORTGAGE.

I. Effect on relation of landlord and tenant.

M., being seised in fee of land, mortgaged to *O.*, but remained in possession, and afterwards demised part for a term to *B.*, who also entered; after which *M.* mortgaged to *H.* *H.*, after this, received rent from *B.*, and demised the other part to *A.* Afterwards *B.* and *A.*, on notice from *O.*, paid *O.* rent. *H.* then brought ejectment (after notice to quit) against *B.* and *A.*

Held, that *B.* and *A.* might both shew, in defence, the first mortgage to *O.*, *O.*'s notice to them, and their payment of rent to *O.*; for,

That, although *B.* could not dispute *M.*'s title at the time of the demise, he might shew that *H.* had no derivative title from *M.*, and he was not precluded by having paid rent to *H.* under a mistake of the facts.

That *A.*, by shewing that *M.*, at the time of the demise to him, was only mortgagor in possession, did not impugn *M.*'s right to confer upon him, by the demise, a legal title to the possession, but might shew that *M.* had since been treated as a trespasser by the mortgagee, so as to determine *M.*'s right: and that *O.*'s notice to the tenant to pay him the rent might, if received in evidence, tend to shew that by so doing *O.* treated the mortgagor as a trespasser. *Doe dem. Higginbotham v. Barton*, 307.

II. Mortgagee, 786. *Witness*, I. 2.

MUNICIPAL CORPORATIONS.

I. Charter.

1. Under 7 W. 4. & 1 Vict. c. 78. s. 49. 144. *Certiorari*, I. 1.

2. Not to be disputed by quo warranto against officer, 949. *Quo Warranto*, III. 2.

II. Recorder, 170. *Poor*, XVIII.

III. Mayor.

1. Order

1. Order of election, 869. *Statute*, LI. 1.
2. What votes he may give, 869. *Statute*, LI. 1.
- IV. Alderman.
 1. Of *London*, 819. *London*, I.
 2. Triennial election, order of, 869. *Statute*, LI. 1.
 3. Vacancy by expiration of office, 869. *Statute*, LI. 1.
 4. Vote of outgoing, 869. *Statute*, LI. 1.
- V. Councillor: office when full, 512. *Mandamus*, II.
- VI. Meetings: on *November* 9th, 869. *Statute*, LI. 1.
- VII. Burgess roll.
 1. Title of burgesses, how not questioned, 508. *Quo Warranto*, VI. 6.
 2. Opening, 508. *Quo Warranto*, VI. 1.
- VIII. Elections.
 1. Acceptance of office, 505. *Affidavit*, I. 1. 508. *Quo Warranto*, VI. 1.
 2. Objections to votes, 508. *Quo Warranto*, VI. 1.
 3. Publication, 512. *Mandamus*, II.
 4. Signature of declaration, 508. *Quo Warranto*, 512. *Mandamus*, II.
 5. Of mayor and aldermen, 869. *Statute*, LI. 1.
 6. When complete, 512. *Mandamus*, II.
 7. What acts mere nullities, 512. *Mandamus*, II.
 8. Proper remedy, 512. *Mandamus*, II.
- IX. Application of borough fund.
 1. Payment of lawful debts, 490. *Bond*, II.
 2. Defence of quo warranto, 490. *Bond*, II.
- X. Gaol.
 1. Contract with county justices, 144. *Certiorari*, I. 1.
 2. Borough which never has had one, 144. *Certiorari*, I. 1.
- XI. Orders: certiorari when not taken away by sec. 132, 144. *Certiorari*, I. 1.
- XII. Justices' clerk, 9. *Statute*, LI. 4.
- XIII. Coroner, 949. *Quo Warranto*, III. 2.

- XIV. Quarter sessions.
 - Grant of, 170. *Poor*, XVIII. 144.
 - Certiorari*, I. 1.
- XV. *Certiorari*. *Certiorari*.
- XVI. Compensation. *Compensation Statute*.

NAVIGATION.

Canal.

NEW ASSIGNMENT.

- I. 1. And replication, 411. *Consideration*, I. 1.
2. Traverse of, 759. *Easement*, II.
- II. 1. Evidence, 759. *Easement*, II.
2. Application of evidence, 665. *Way*, II.

NEW SOUTH WALES.

- p. 108. *Transportation*.

NEW TRIAL.

- When refused, 28. *Covenant*, III. 1.

NOMINATION.

- By "the meeting," 15. *Vestry*, I.

NON ASSUMPSIT.

- Evidence, 458. *Consideration*, I. 2.

NONCLAIM.

- p. 842. *Fine*, I.

NONSUIT.

- On demurrer, 244. *Writ of Right*.

NOTE.

- Promissory. *Bills of Exchange*.

NOTICE.

- I. In particular cases, 507. *Mortgage*, I. 589. *Agent*, III. 720. *Landlord and Tenant*, X. 1. 798. *Master*, V. 144. *Certiorari*, I. 1.

II. As

II. As essential to jurisdiction, 179. *Foreign Judgment*.

III. To party by whose act &c.

1. A party convicted by two justices in special sessions, under the general highway act, 5 & 6 W. 4. c. 50. ss. 47. 103., on information by one of the surveyors, cannot be heard on appeal to the quarter sessions under sect. 105, unless he has served notice on both the convicting justices.

It is not sufficient that he has served notice on the surveyors, and has also served a notice on one of the justices, addressed to both, which that justice has transmitted to the clerk of the special sessions, with an observation to him that he will know how to act upon it. *Regina v. Bedfordshire Justices*, 134.

2. A licensed victualler, convicted by two justices under stat. 9 G. 4. c. 61. s. 21. of an offence against the tenor of his license, cannot be heard on appeal to the quarter sessions under sect. 27, unless he has served notice of such appeal on both the convicting justices.

And this although at the time of giving notice the conviction had in fact been signed only by that justice; at least, if there be no proof that the conviction so signed was communicated to the appellant before he gave notice, so that he might have been misled thereby. *Regina v. Cheshire*, 139.

IV. 1. When sufficient if not denied, 144. *Certiorari*, IV. 3.

2. Objection to: by what consent not cured, 159. *Certiorari*, I. 2.

V. Pleading, 179. *Foreign Judgment*.

NUDUM PACTUM.

pp. 411. 438. *Consideration*, I.

NUISANCE.

Injury to the reversion, 40. *Case*, II. 1.

NULLITY.

Certiorari to remove, 202. n. *Certiorari*, III.

OBJECTION.

I. 1. When to be taken, 28. *Covenant*, III. 1.

2. To jurisdiction on summons, 913. *Costs*, II. 2. 941. *Writ of Trial*.

3. To claim for compensation, 66. *Statute*, LI. 5.

II. What not a waiver, 159. *Certiorari*, I. 2. 720. *Landlord and Tenant*, X. 1.

III. In margin of paper book. *Freud v. Butterfield*, 838.

OCCUPATION.

pp. 57. 463. 677. *Poor*, V. VI.

OCCUPIER.

Of part of the messuage which &c., 788. *Prescription*, II.

OFFICE.

I. Nature and tenure: see *Municipal Corporation*. *Vestry*.

II. Appointment.

1. Informal, 9. *Statute*, LI. 4.

2. Election. *Election*.

III. Vacancy: by expiration of time, 869. *Statute*, LI. 1.

III. 1. When full, 512. *Mandamus*, II.

2. Acceptance of, as ground for quo warranto, 505. *Affidavit*, I. 1. 508. *Quo Warranto*, VI. 1.

IV. See also *Compensation*. *Quo Warranto*.

OFFICER.

I. Liability for deputy, 813. *Marshal*, I.

II. Protection, 777. *Constable*, III. 1. 993. *Landtax*.

OFFICER, PUBLIC.

p. 520. *Partner*, III. 1.

ORDER.

I. Generally.

1. Shewing jurisdiction, 373. *Bankrupt*, I.

2. Entireness of, 558. *Poor.*
3. Construction, 373. *Bankrupt*, I.
4. Surplusage, 373. *Bankrupt*, I.
5. Acquiescence in, 913. *Costs*, II. 2. 941. *Writ of Trial*.

II. Supersedeas, 809. *Poor*, XVI.

OUSTER.

Of tenant in common, 1008. *Devise*, II.

OUTSTANDING TERM.

Term.

PAPERS, PARLIAMENTARY.

p. 297. *Parliament*, III.

PARCENER.

p. 842. *Fine*, I.

PARENT AND CHILD.

- I. Seduction, 803. *Witness*, II. 1.
- II. Registration, 727. *Registration*.

PARISH.

- I. Apportionment, 343. *Turnpike*, II.
- II. Apprentice, 656. *Poor*, IX. 2.

PARLIAMENT.

I. Resolutions and orders.

Goods of *H.* being taken under a *fi. fa.* for damages, a venditioni exponas was sued out, to which the sheriff (after obtaining an extension of time) returned (*December* 19th) that he had sold for the money directed to be levied, and had the amount in court to be rendered to the plaintiff, as commanded by the writ. He did not, however, on request, pay the money to the plaintiff, who, on the first day of the following term, obtained a rule calling on the sheriff to shew cause why he should not pay over to the plaintiff the amount mentioned in the return.

Held, no answer to the application, that the House of Commons, by resolutions subsequent to the granting of the rule, had declared the levy a contempt of their privileges, ordered the

PARLIAMENT, I. II. 1, 2.

sheriff to pay back the money to *H.*, and committed the sheriff, for his alleged contempt, to the custody of the serjeant at arms, where he remained at the time of shewing cause.

Quære, whether, after such return as above stated, the sheriff could excuse nonpayment of the money under a rule of Court, by shewing that, without actual laches on his part, he had been prevented from paying it by superior force.

After the above return, and after the granting of the rule nisi, the Insolvent Debtors' Court, by an order purporting to be made in the matter of *S.* (the plaintiff), an insolvent, on the application of a creditor, directed the sheriff to retain the money levied till further order of that court, and that he and *S.* should shew cause why the money should not be paid over to the provisional assignee.

Held, that the pendency of such rule was no answer to the present application, since this Court, after directing the money to be paid over to *S.*, could provide, by further order, for the interests of the parties really entitled.

And, the sheriff not having paid over the money in obedience to the order, the Court made a rule for an attachment absolute against him, though he deposed that he was personally under confinement, and had no means of obeying the order but by directing his subordinate officers to pay the money, which if the officers did, they would probably incur a like imprisonment. *Stockdale v. Hansard*, 253.

II. Contempt.

1. Commitment for, when no excuse, 253. *Antè*, I.
2. What warrant sufficient.

To a *habeas corpus ad subjiciendum* &c., it was returned by the serjeant at arms of the House of Commons that he detained the prisoners on the following warrant, directed to him by the speaker.

"Martis 21^o die *Januarii* 1840. Whereas the House of Commons have this day resolved that *W. E.* and *I. W.*, sheriffs of *Middlesex*, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the serjeant at arms attending

attending this House: these are therefore to require you to take into your custody the bodies of the said *W. E.* and *I. W.*, and them safely to keep during the pleasure of this House, for which this shall be your sufficient warrant. Given under my hand," &c. "*C. S. Lefevre, speaker.*"

Held,

1. That the warrant was not bad for omitting to state the grounds on which the parties had been adjudged guilty of contempt.

2. That this Court could not inquire by affidavit into the merits of the commitment, even if the case were within stat. 56 G. 3. c. 100. Although, in affidavits on which the habeas corpus issued, it was sworn that the parties were in fact committed for executing process in obedience to rules of this Court.

3. That the word "having," in the warrant, was a sufficient averment that the parties *had* been guilty of contempt.

4. That the return sufficiently shewed an authority to issue such warrant on behalf of the House.

5. That the words "this House," in the warrant, were not uncertain, no house being therein mentioned but the House of Commons.

6. That the warrant was not too uncertain in alleging "a contempt and breach of the *privileges* of this House," and not a contempt of the *House*. *Middlesex Sheriffs' Case*, 273.

3. Grounds not inquirable on affidavit, 273. *Ante*, 2.

III. Publication by order of: stay of proceedings.

Under stat. 3 & 4 *Vict. c. 9. s. 1.*, the Court will stay proceedings in an action, upon a certificate by the speaker (properly verified), that the publication mentioned in the declaration (reciting a description of it as therein given), and in respect of which the action is brought, was published by order and under the authority of the House of Commons; the declaration being verified by affidavit, and appearing to be for the publication of an alleged libel, the description of which corresponds with that in the speaker's certificate.

It is not necessary that the certi-

cate itself should further describe the action or declaration.

Quere, whether the declaration need be verified at all. *Stockdale v. Hansard*, 297.

PARTICULARITY.

I. In memorandum ratifying contract, 934. *Infant*.

II. In examinations, &c. *Poor*, XIII. XIV.

III. In affidavits, 505. *Affidavit*, I. 1. 508. *Quo Warranto*, VI. 1.

IV. In commitment, 275. *Parliament*, II. 2.

PARTIES.

I. Nonjoinder, 205. *Detinue*. 993. *Land-tax*.

II. Suggestion or sci. fa., 520. *Partner*.

PARTNERS.

I. Authority to bind the firm.

1. By composition deed, 216. *Circuity*, I.

2. By making notes, 339. *Bills*, II.

3. Question whether a contract was intended to bind any without concurrence of all.

In *assumpsit* on a contract for the delivery of coals from a colliery, it appeared that the agreement (for supplying such coals and for the demise of a coal wharf) purported to be made between plaintiff and the partners in the colliery, three in number, and was executed by plaintiff and two of the partners.

Held that, admitting such contract to be one by which partners might bind an absent co-partner, yet the judge, on trial, ought not to direct the jury as matter of law that the contract signed by two bound them, but should desire the jury to say whether it was intended to do so or not, if there are circumstances from which an intention can be inferred that no party should be bound unless all the partners signed.

As, the nature and terms of the agreement; the distance of time at which it was to come into operation; the declarations and conduct of the parties respecting it; and the manner in which previous contracts between them, of the same kind, had been executed. *Latch v. Wedlake*, 959.

II. Deviation from style, 339. *Bills*, II.

III. Banking copartnership.

1. Execution against partner.

Where judgment has been obtained against the public officer of a banking copartnership, sued on their behalf under stat. 7 G. 4. c. 46. ss. 9, 12, 13., the proper mode of proceeding to execution against a particular partner (not being such officer) is by scire facias. The Court will not allow a suggestion to be entered for that purpose on affidavit shewing the individual to be a partner. *Bosanquet v. Ransford*, 520.

2. What affidavits. *Bosanquet v. Ransford*, 525. n.

IV. Joint Stock Company. *Company*.

PARTY WALL.

By landlord or tenant, 645. *Executor*, I.

PAUPER LUNATIC.

p. 170. *Poor*, XVIII.

PAYMENT.

I. To agent, 926. *Auction*.

II. Estoppel by, 335. *Landlord and Tenant*, IX. 2. 307. *Mortgage*, I.

III. Before levy, 826. *Sheriff*, V.

PETITIONING CREDITOR.

Bankrupt, I.

PLEA.

I. To new assignment extra viam where one way is not disputed, 665. *Way*, II.

II. 1. General issue by statute, 195. *Costs*, I.

2. New rules.

PLEA, II. 2, 3. III. 1, 2. IV. V.

Where a statute enables defendants to plead the general issue and give the special matter of defence in evidence, the plea of Not guilty so pleaded is not affected by the New Rules of Hil. 4 W. 4., but operates as before they were framed, putting in issue, not only defences peculiar to the statute, but all that would have arisen at common law.

Therefore the Court, in the exercise of its discretion under stat. 4 Ann. c. 16. s. 4., will not give leave to plead Not guilty "by statute," together with a special plea, although such special plea raise a defence quite independent of the statute. *Ross v. Clifton*, 631.

3. What put in issue.

The plea of Not guilty "by statute," pleaded under stat. 11 G. 2. c. 19. s. 21., in an action for an excessive distress, puts in issue, not only the matter of justification, but the tenancy, and ownership of the goods. *Williams v. Jones*, 643.

III. 1. What must be specially pleaded: in debt for road calls, 418. *Turpin*, I. 1.

2. Statute of frauds need not, 438. *Consideration*, I. 2.

IV. Pleading several matters, 631. *And*, II. 2.

V. Setting aside.

In future when a motion is made for the purpose of setting aside pleas pleaded by a Judge's order or rule of Court for pleading several matters, the motion must be to rescind the order or rule, not to strike out the pleas.

On motion to set aside pleas, it appeared by affidavit that they were pleaded to the first and second counts of a declaration at the suit of a railway company, and were: to the first count, 1. That the call was not duly made upon all the subscribers and shareholders by competent persons, and for the sole purpose of the undertaking: 2. That due notice was not given of the call. To the second count the like pleas. Nothing further appeared as to the declaration. Held, that the declaration ought to have been set out, and that the Court could not, on this statement, entertain the motion. *South Eastern Railway Company v. Sprot*, 167.

PLEADING.

PLEADING.

Confession.

Trespass for an assault and battery. Plea of son assault demesne, beginning, "And for a further plea in this behalf," and alleging that, "just before the said time when &c.," plaintiff assaulted defendant, and would have beaten him if he had not immediately defended himself &c., "wherefore he, the defendant, did then defend himself against the plaintiff," &c.; and that, "if any hurt or damage then happened or was occasioned," to plaintiff, the same happened and was occasioned by the assault of plaintiff on defendant, and in the necessary defence &c.

Held, on special demurrer, that the plea sufficiently confessed an assault and battery; and that, the hypothetical averment, "if any," &c., relating merely to "hurt or damage," not to the fact of an assault, the form was no ground of objection. *Wise v. Hodsohl*, 816.

II. Rule that the whole must be answered, 1033. *Insolvent*, IV.

III. Title.

1. Adverse possession.

Trespass quare clausum fregit. Declaration August 1838, laying trespasses on June 27th, 1838.

Plea, that *W.*, being seized in fee of the close, before the time when &c., towit June 23d, 1791, demised it to *J. H.* for ninety years, by virtue of which demise *J. H.* afterwards, towit on the same day, entered and was possessed: That after the demise, and during the term *J. H.* being so possessed, towit on November 21st, 1812, made his will and thereby bequeathed the close to *W. H.* for all his, the testator's, estate therein. That afterwards, towit in January 17th, 1820., *J. H.* died so possessed of the said close for the remainder of the said term, after whose death, towit on 21st February 1820, the executors assented to the bequest, whereby *W. H.* then became and was possessed for the remainder of the term: and, he being so possessed, plaintiff, under colour of a pretended demise to him for his life by *W.* before the demise by *W.* to *J. H.*, entered, towit on the day and year mentioned in the declaration, and was possessed:

and thereupon defendant, at the time when and &c., as the servant of *W. H.*, entered upon plaintiff, &c.

Replication; That the trespasses were committed after December 1833, mentioned in stat. 3 & 4 *W. 4. c. 27. s. 2.*: That the entry was for the purpose of recovering the said close: That the supposed right of entry, did not first accrue within twenty years next before such entry, and that by reason thereof the said right had become extinguished at the time when &c.

Rejoinder: That no acknowledgment of title had been given pursuant to stat. 3 & 4 *W. 4. c. 27. ss. 14, 15.*, before the passing of the act: That *W. H.*, at the time of the passing of the act, claimed to be and was entitled to the close as in the plea mentioned: That the close was not then possessed adversely to the right of *W. H.*: And that the entry was made, as in the plea mentioned, within five years next after the passing of the act.

Surrejoinder: That the close at the time of the passing of the act, was possessed, towit by one *S.*, adversely to the alleged right of *W. H.* Issue thereon.

Held, that the replication did not admit a possession in *J. H.* or *W. H.* within twenty years, and therefore was not inconsistent with itself.

That, before the statute, the surrejoinder would have been bad, as admitting a demise to *J. H.*, and shewing no subsequent title in plaintiff, nor any other matter in bar of *J. H.*'s title.

But that, since the statute, it being admitted by the rejoinder that *W. H.*'s right of entry did not accrue within twenty years, adverse possession by any person at the time of the act passing made *W. H.* a wrong-doer if he afterwards entered, and mere possession by plaintiff at the time of the trespass was sufficient ground for this action. *Holmes v. Newlands*, 44.

2. In stranger, 44. *Antè*, 1.

3. When not required from plaintiff in trespass, 44. *Antè*, 1.

4. Life of cestui que vie.

A declaration in debt by assignee of the reversion against assignee of the lessee for rent, in which it appears that the reversion was conveyed to plaintiff for his life if *A.* and *B.* should

so long live, must aver continuance of the lives of *A.* and *B.*; and the want of such averment is not cured, on general demurrer, by a statement in the breach, that the rent "accrued due after the plaintiff became so seised as aforesaid" of the reversion, and "became and was due and still is in arrear to the plaintiff."

Semble, when a leasing power requires that the lessee shall execute a counterpart, it is not necessary that the execution of the lease and of the counterpart should be contemporaneous.

A power to lease, so as the usual rent be reserved or made payable yearly is well executed by a lease reserving the usual yearly rent, but making it payable half-yearly. *Fryer v. Coombs*, 403.

5. Averments to shew powers of leasing duly executed, 403. *Antè*, 4.

IV. Colour, express, 44. *Antè*, III. 1.

V. Time, effect of videlicet, 44. *Antè*, III. 1.

VI. Place, onus of fixing it with certainty, 665. *Way*.

VII. Notice, 179. *Foreign Judgment*.

VIII. Request: when essential to consideration, 438. *Consideration*, I. 2.

IX. Process, 179. *Foreign Judgment*.

X. Admission by.

1. By express colour, 44. *Antè*, III. 1.

2. By traversing allegation of adverse possession instead of the date at which the right of entry accrued, 44. *Antè*, III. 1.

3. By new assignment and plea thereto, 665. *Way*.

4. See also 816. *Antè*, I.

XI. Traverse.

1. Special, of promise modo et forma.

Assumpsit by payee against maker of a promissory note: Plea, as to part, that the note was delivered to plaintiff for the purpose of his paying, on defendant's account, certain debts of defendant to his creditors; that plaintiff took it on the terms and understanding, and for the purpose aforesaid, and then promised defendant to pay the said debts in manner aforesaid; and that no consideration was received by

defendant or given by plaintiff for the note. Replication, that the note was made and given to plaintiff, at the request of the creditors, for the purpose of paying them so soon as defendant paid the note; *without this* that plaintiff promised to pay the said debts as alleged in the plea. Issue joined on the special traverse. At the trial, plaintiff proved the inducement of his replication, and had a verdict.

Held, that the issue was a material one; that the evidence entitled the plaintiff to a verdict on such issue; and that there appeared on the record a sufficient consideration to entitle the plaintiff to judgment. *Cole v. Cresswell*, 661.

2. Immaterial averment may not be included, 453. *Accord*.

3. Of new assignment, 759. *Easement*, II.

XII. Negative pregnant: by including in the traverse an immaterial consent, 453. *Accord*.

XIII. Certainty.

1. In identifying cause of action, 179. *Foreign Judgment*.

2. Onus on which party, 665. *Way*, II.

3. In pleading illegal composition, 710. *Bankrupt*, II.

XIV. Particularity.

1. In accounting for exhaustion of levy, 539. *Sheriff*, I. 2.

2. In declaration qui tam, 838. *Coals*.

XV. Argumentativeness, 529. *Sheriff*, VIII. 1.

XVI. Positiveness: hypothetical averment as to matter of aggravation, 816. *Antè*, I.

XVII. Repugnancy. 44. *Antè*, III. 1.

XVIII. Duplicity: replication and new assignment, 411. *Consideration*, I. 1.

XIX. Implication.

1. Of duty from the facts alleged, 223. *Canal*, IV.

2. Of continuance of life, 403. *Antè*, III. 4.

3. From date of counterpart. *Fryer v. Coombs*, 407.

4. Confession by, 816. *Antè*, I.

XX. Surplusage.

XX. Surplussage.

1. Unnecessary allegation of duty, 323. *Canal*, IV.
2. Unnecessary allegation of consent, 453. *Accord*.

XXI. Divisibility.

1. Of demurrer, 411. *Consideration*, I. 1.
2. Of consideration, 1027. *Insolvent*, IV.

XXII. Largeness.

1. Of demurrer, 411. *Consideration*, I. 1.
2. Of traverse, 453. *Accord*.

XXIII. New rules. *Plea*, II.

POLL.

p. 15. *Vestry*, I.

POOR.

I. Commissioners.

1. Powers of old unions.

In a poor law union formed under *Gilbert's Act*, 22 G. 3. c. 83., the commissioners under stat. 4 & 5 W. 4. c. 76. may, by sect. 46., direct the appointment of an auditor for the union, to audit the accounts of the incorporation and of its several parishes at proper periods; to examine into the expenditure and allow or disallow charges; and to see that the accounts are properly stated and supported by vouchers, and all sums received, or which ought to have been received, brought into account; with power, in case the accuracy of any account shall be doubted, to compel the appearance of persons and production of documents.

They may also appoint a clerk (with a salary) to attend meetings of the guardians, keep minutes of their proceedings, conduct their correspondence, communicate orders from the commissioners and guardians to the persons administering relief within the union, give instructions for executing such orders, and report neglects, &c.; and to keep a book of monies received and paid, orders and checks given, accounts passed, and salaries ordered to be paid, by the guardians; to make up and balance the union ac-

counts, and abstract them quarterly, &c.; to assist the auditor in making a quarterly abstract of the accounts of each parish; and to revise the accounts of the master of the poor-house.

But they cannot direct that such clerk shall, as a part of his duties, "prepare or superintend the preparation, and take measures for ensuring the prompt and correct return, of all such statistical information and reports as may be required for the public service."

And an order for the government of an incorporation, containing such a clause, is altogether void. *Regina v. Poor Law Commissioners*, (*Allstonefield case*), 558.

2. Their order, when entire, 558. *Antè*, 1.

II. Election of select vestry, 15. *Vestry*, I.

III. Officers of union, 558. *Antè*, I. 1.

IV. Rate.

1. Statutory form.

The words of stat. 6 & 7 W. 4. c. 96. s. 2., declaring that a rate "shall be of no force and validity," apply only where the declaration at the foot of the form is not signed by the parish officers; not where the particulars prescribed in the earlier part of the section are deviated from.

A rate is bad which is made for a period for which a rate has already been made and not quashed.

On motion to quash documents brought up by certiorari, the Court will not entertain the objection, that the documents appear by the return to have been misdescribed in the writ. *Regina v. Fordham*, 75.

2. Publication.

Where some poor rates had not been duly published on the *Sunday* following the allowance, according to stat. 17 G. 2. c. 3. s. 1., and a warrant of distress issued for a single sum, made up of these rates and of others which were regular: Held, that the warrant was wholly bad, and that replevin lay for a distress taken under it. *Sibbald v. Roderick*, 38.

3. Must not be concurrent, 75.
4. How got rid of, 75. *Antè*, 1.
5. Distress and replevin, 38. *Antè*, 2.

6. Practice on certiorari, 73. *Ante*, 1.

V. Property rateable.

1. Occupied for public purposes, 57. *Post*, VI. 1.

2. Canals.

By stat. 10 *Ann. c. 8.* (private) certain persons were authorised to make a river navigable, to form new cuts through the adjoining lands, to erect bridges, &c., and to set out towing-paths for men, first giving satisfaction to the owners of lands to be dug or used. Commissioners were appointed to decide differences and to settle what satisfaction every owner or occupier of land should have for any portion of his land so to be used, and what share of such purchase-money or satisfaction every tenant or other person should receive: and in certain cases the commissioners were to summon a jury to assess damages and recompense to the owners and occupiers of such lands as should be used for or damaged by making the river navigable, for their respective estates and interests therein, or for the loss or damage they should sustain: and on payment of the sums assessed, the undertakers were authorised to have, use, and enjoy the lands for their proper use and benefit. The navigation was made common to all persons, on payment of toll to the undertakers.

By stat. 47 *G. 3. sess. 2. c. cxxix.* (local and personal, public), reciting that the undertakers had purchased lands and formed the navigation, power was giving them to make a towing-path for horses. The act enabled them to purchase lands, or to agree with landowners for damage to be done; the purchase-money, or satisfaction, in case of disagreement, &c., to be assessed by commissioners as under the former statute, or by a jury; and on payment the undertakers might enter, and thereupon all the estate, &c. of any person in the lands was to vest in, and become the sole property of, the undertakers; judgments of the commissioners and verdicts of juries to be transmitted to the clerk of the peace, and deemed records of the sessions. A right of way over the towing-path was reserved to the owners of the lands through which it was made.

By inquisition, taken in 1725, a jury

found that certain lands were necessary for making a cut, &c., part of the navigation, and assessed damages for the same, as a full recompense to be paid by the undertakers for the same lands, thirty years' purchase at so much per acre; part of the sum being awarded to termors, the residue to the lords of the fee. Damages were also awarded to various persons for loss of tithes, common &c., and for trees, on the lands to be used. By another inquisition taken in 1813, for determining the satisfaction to certain landowners for such of their lands as should be taken for the navigation, and for the damages to be sustained thereby, the commissioners awarded an annual payment by the undertakers, for certain land, required for a horse towing-path, such payment to be a satisfaction to all persons having any interest in the lands; and they awarded so many years' purchase for other lands.

The undertakers made a lock, canal, and towing-path, with culverts and bridges, upon the lands mentioned in the inquisition, paying full remuneration. No conveyance was ever executed. Part of the breadth of land taken for the towing-path was used as a public footway, which existed before the act of *G. 3.*: the residue was depastured by the owners of the adjoining land, who, by the last mentioned act, had right of way over it for the purpose of access to the river. The path was, in general, not divided from the adjacent fields. Gates &c., were kept on it by the undertakers for the benefit of the neighbouring landowners.

The undertakers having been rated to the poor for their towing-path, canal, and locks: Held, 1. That the land used for those works was vested in the undertakers under the said acts, without any conveyance.

2. That, even if this were not so, they were liable to poor-rate as the exclusive occupiers. *Bruce v. Willis*, 463.

3. Tin-toll.

On appeal against a rate upon tolls of tin, the sessions stated a case shewing that, by the custom of the stannaries, the right of working tin mines in certain manors is vested in the owner of

of tin bounds, he paying the lord or his lessee one tenth of the tin gained: that the appellant, being the lord's lessee of the toll and farm of tin, granted to *R.*, for a term, liberty to enter one of the said mines, and dig and search for tin there, and to carry away the tin, yielding, paying, and delivering to appellant from time to time, within six weeks after the return or sale of every parcel of tin gotten in the premises, 1s. in the pound on the gross value of all tin which should, from time to time, be so gotten: that *R.*, at the time of the grant, was an owner of tin-bounds, within which the mine was situate: and that *R.* worked the mine after the demise, paying appellant 1s. in the pound, in money, according to the reservation.

Held, that the grant was a good and not a colourable demise, at least of the tin-tolls, the sessions not finding fraud: that the 1s. reserved was a rent, and not a virtual share of the produce of the mine; and, therefore, that the appellant was not rateable in respect of it as an occupier.

But that, for tin-toll received in kind from other mines, he was so rateable. *Regina v. Crease*, 677.

4. Evidence of exclusive occupation, 463. *Ante*, 2.

VI. Persons rateable.

1. When not general body on account of individual benefit.

Under a local act (1 & 2 *W.* 4. c. xlviii.), the justices of the peace of the county of *W.* (so described in the act), were authorised to purchase lands &c., for the erection of a county hall, courts of justice, and lodgings for the judges of assize for the county, and to erect the same; and they were to possess them for the purposes of the act, and to pay for them out of the county rates; but the justices were not to be individually liable on any contracts. The materials, furniture, &c., were vested in them, and they were enabled to sue or prosecute in respect thereof in the name of the clerk of the peace, the property to be laid as the property of "the justices of the peace for the county of *W.*" The lands and buildings were vested in them on trust to suffer courts to be held, and other

public county business to be transacted there. The buildings were to be insured, repaired, and furnished at the expense of the county. The justices had power to let the judges' lodgings, making reservation for the use of the judges and magistrates at proper times, and applying the rent to county purposes only. The justices were to be paid by the sheriff such sums as were allowed him by the exchequer for the accommodation of the judges.

The buildings were erected and applied to the purposes of the act; but the house called the judges' lodgings was not let.

Wine was kept in the house, which was paid for by subscription by the magistrates, and drunk by them at their session dinners; and some of the magistrates occupied bed-rooms there during their attendance at sessions, the rooms being appropriated to those who first bespoke them.

Held, that the justices of *W.*, as a body, were not liable to poor-rate, as occupiers of the judge's lodgings. *Regina v. Worcestershire Justices*, 57.

2. Legal occupier. *Rex v. Wilson*, 684. n.

VII. Derivative settlement: what to be stated, 616. *Post*, XIII. 3.

VIII. Birth settlement: what to be stated, 607. 616. *Post*, XIII.

IX. Settlement by apprenticeship.

1. Inhabitation without service.

The pauper, an illegitimate child, resided with his mother and a man whom she married, in parish *B.*, and was maintained by them. While so resident he was apprenticed (by a charitable institution), to his mother's husband, for seven years, to learn the trade of a bricklayer. He resided with his mother and her husband as before, during the seven years. During that time he never was taught nor served in the trade of a bricklayer, but worked at odd jobs about the house when he liked, and sometimes did work in the trade of a potter, under contracts of hiring entered into by his master's consent, with various persons in *B.*, paying his master a part of his wages for maintenance, and disposing of the rest as he chose.

Held,

Held, that the pauper gained a settlement by inhabitation in *B.* during the apprenticeship, under stat. 3 & 4 *W. & M. c. 11. s. 8.* *Regina v. Burslem*, 52.

2. Placing out or putting away.

A parish apprentice, bound for seven years to *A.*, served him for four years, when *A.* agreed with *B.*, who carried on the same business in another parish, that the pauper should work for *B.*, *B.* paying *5s.* a week to *A.* out of the pauper's earnings. The pauper accordingly went and continued to work for *B.* till the end of his apprenticeship, with the exception of ten days, when he was sent for by *A.* to assist him during illness. *B.* paid *A.* at the rate agreed upon, deducting the ten days' absence during *A.*'s illness.

Held, there being no consent of justices, that this was a "placing out," or "putting away" of the apprentice within 56 *G. 3. c. 139. s. 9.*, and that no settlement was gained by the service under *B.* *Regina v. Wainfleet All Saints*, 656.

3. What to be stated and how, 90. 616. *Post*, XIII. XIV.

X. Former order.

Between the same parties.

Pauper was removed from *B.* to *C.* on an examination of himself, stating a settlement by occupying a tenement from *June 1827* to *June 1828*. This was denied by the notice of objections; and, on appeal, the occupation appeared to be from *June 1828* to *August 1829*; whereupon the sessions quashed the order. Afterwards, the same pauper was removed from *B.* to *C.* on a fresh examination of himself, stating the settlement as before, but with the right dates. The order was objected to, on the ground that the former order was conclusive between *B.* and *C.*

Held, that it was so; and, the sessions having affirmed the order, this Court quashed the order of sessions. *Regina v. Clint*, 624.n. See also 809.

XI. Removal: original hearing.

1. Who are parties, 607. *Post*, XIII. 1.
2. Pauper's admissions, 607. *Post*, XIII. 1.

XII. Appeal: jurisdiction of recorder, 170. *Post*, XVIII.

XIII. Examinations.

1. Disclosing no legal evidence.

It is a good ground of appeal (under stat. 4 & 5 *W. 4. c. 16. s. 81*) against an order of removal, that the examination upon which it was made, though it sets forth facts which shew a settlement, does not disclose any legal evidence of such facts.

Therefore, where an order of removal was made upon the examination of the pauper and his father, in which the father stated that the place of his father's settlement was *E.*, as he had heard his father say, and believed to be true, and that he had heard his father say he had received relief from the overseers of *E.*; and the pauper himself stated that his father's place of settlement was at *E.*, as he had heard him say, and believed to be true: Held, that such order was bad on an appeal stating, as one of the grounds, that the order was "bad and inoperative," and the examinations on which it was made "defective and insufficient to ground and support the same." *Regina v. Ecclesall Bierlow*, 607.

2. Disclosing some illegal evidence. *Quære*, *Regina v. Tetbury*, 615. See also 616. *Post*, 3.

3. Disclosing no legal evidence of particular heads.

Under sect. 81 of stat. 4 & 5 *W. 4. c. 76.* (precluding respondents from going into other grounds of removal than those set forth in the order and examination), the sessions must reject evidence of any grounds of removal which do not appear, on the face of the examination, to have been proved before the removing justices by some legal evidence, provided the defect of evidence be pointed out by the notice of objections.

Thus, where a birth settlement of pauper's husband was proved only by the husband stating that he was born in the appellant parish, "as I have heard and believe," and the objection was that it was not proved or set forth "upon the oath of any credible witness" when or where the husband was born, this Court held that the evidence of the birth was merely hearsay, the objection

objection sufficiently taken, and *all* evidence of the birth inadmissible at sessions.

Although it appeared, in the examination, that the husband, when examined, was "confined in *W.* gaol for felony," and the respondents contended that the objection pointed only to the inadmissibility of a convicted felon.

2. An examination stated an apprenticeship, and a service in the appellant parish with a party other than the niaster, but did not state the master's consent. Held, that the examination was bad on the face of it, so far as regarded a settlement by apprenticeship.

Although the examinant (the apprentice) stated that it was agreed, in the indenture, that he should serve the last forty days of his apprenticeship in *L.*, the appellant parish, "*and I served the last forty days in L., with A. H., my master's father.*"

Held also, that the objection was sufficiently taken by objecting that it did not appear that the examinant served *A. H.* with the consent of the master, or in any other manner, under any indenture of apprenticeship, alleging some additional defects, and then proceeding thus, "*and the said examinations are too general, and are wanting in sufficient particularity in each of these last mentioned respects.*"

3. Semble, per *Patteson J.*, that, where the settlement relied on is a derivative one from the pauper's father, whose alleged settlement is by apprenticeship, the examination should give the date of the apprenticeship. *Regina v. Lydeard St. Lawrence*, 616.

4. Construction of, 616. *Antè*, 3.

5. How far binding, 624. n. *Antè*, X.

XIV. Grounds of appeal.

1. When new grounds cannot be entertained.

On appeal against an order of removal, the appellants (under stat. 4 & 5 *W. 4. c. 76. s. 81.*) served a statement of grounds of objection, which only impugned the alleged settlement. On the hearing of the appeal, the bench, being equally divided, adjourned the case to the next sessions. Before the next sessions, the appellants served another statement, containing an ob-

jection to the notice of chargeability under sect. 79.

The sessions having quashed the order of removal, on the objection last mentioned:

Held, that the objection ought not to have been entertained, since it was not mentioned in the original statement of grounds of appeal; and the Court sent the case back to sessions to be heard on the merits. *Regina v. Arlecdon*, 87.

2. Particularity.

Stat. 56 *G. 3. c. 139. ss. 1. 2.*, provide several requisites to the due binding of parish apprentices; among others, that the binding be ordered, and indenture allowed and signed, by particular justices; and, where the child is bound by a parish to a party residing in another parish, that notice be given to the overseers of the latter and proved or admitted before the justices by one of such overseers personally, before the indenture be signed. Sect. 5 enacts that no settlement shall be gained by such apprenticeship, unless such order be made, and such allowances signed, "*as hereinbefore directed.*"

An appellant parish stated (under sect. 81 of stat. 4 & 5 *W. 4. c. 76.*), as the ground of appeal against a removal founded on a settlement by parish apprenticeship, "*that the requisites of stat. 56 G. 3. c. 139., and more particularly sect. 5, were not complied with.*"

Held, that the appellant parish could not, under this statement, dispute the settlement at sessions, on the ground that their overseers had no notice, and were not present at the binding. *Regina v. Whilcy Upper*, 90.

3. Insufficiency of examinations, 607. 616. *Antè*, XIII.

4. Construction of, 616. *Antè*, XIII. 3.

XV. Trial: effect.

Of adjournment on equal division, 87. *Antè*, XIV. 1.

XVI. Supersedeas: when too late.

An order of removal was, at the instance of the removing parish, and after the pauper had been removed and an appeal lodged at sessions, superseded by an order of the removing justices,

justices, which recited that the removing parish had discovered the original order to be founded on an incorrect examination.

Held, that the supersedeas was too late, and that the appellants had a right to insist on the appeal being heard.

And the sessions having refused to hear it, a mandamus issued commanding them to enter continuances and hear. *Regina v. Middlesex Justices* 809.

XVII. Practice on special case.

1. Case when sent back for trial, 87. *Ante*, XIV. 1.

2. Certiorari, 159. *Certiorari*, I. 2.

XVIII. Pauper lunatic.

The recorder of a borough, which has a grant of separate quarter sessions under stat. 5 & 6 W. 4. c. 76., has jurisdiction to try an appeal against an order of the borough justices to pay the expense of removing a pauper lunatic to an asylum, under stat. 9 G. 4. c. 40. s. 58. *Regina v. St. Lawrence Ludlow*, 170.

XIX. Bastardy.

Imprisonment for arrears, 777. *Constable*, III. 1.

POSITIVENESS.

In pleading, 816. *Pleading*, I.

POSSESSION.

I. Adverse. *Adverse Possession*.

II. 1. By mortgagor, 307. *Mortgage*, I.

2. Of tenant in common, 1008. *Devise*, II.

III. Wrongful continuance of, 1008. *Devise*, II.

IV. Admission of, in pleading, 44. *Pleading*, III. 1.

V. As evidence of an interest in land, 205. *Statute*, XII. 1.

VI. Writ of, 353. *Ejectment*, IV. 1.

POUNDAGE.

p. 826. *Sheriff*, V.

POWER.

1. To lease, 403. *Pleading*, III. 4.

2. To determine demise, 720. *Landlord and Tenant*, X. 1.

PRACTICE.

I. When not disturbed by resolutions of House of Commons, 253. *Parliament*, I.

II. Where a conflicting rule is pending in another court, 253. *Parliament*, I.

PRACTICE, CROWN.

I. *Quo Warranto*. *Coroner*. *Certiorari*.

II. On special case, 87. *Poor*, XIV. 1.

III. Discharge of unnecessary rule, 128. n. *Coroner*, I. 1. *Waiver*, 159. *Certiorari*, I. 2.

PRESCRIPTION.

I. Period within which a right may be gained.

Under stat. 2 & 3 W. 4. c. 71., sects. 3 and 4, a party is prescriptively entitled to the access and use of light, if his enjoyment commenced twenty years next before the bringing of an action in which the right is contested, provided such enjoyment has not at any time been interrupted, and the interruption acquiesced in, for a whole year.

The clause of sect. 4, requiring that the interruption, to bar a prescriptive title, shall have been acquiesced in for more than a year, is not limited to obstructions preceded and followed by portions of the twenty years, but applies also to an obstruction ending with that period.

Therefore a prescriptive title to the access and use of light may be gained by an enjoyment for three hundred and thirty days, followed by an obstruction (not acquiesced in) for thirty-five days. *Flight v. Thomas*, 688.

II. Period of user.

A plea of forty or twenty years' user, under stat. 2 & 3 W. 4. c. 71. ss. 2. 4., is not supported by proof of user from a period of fifty years before the

the commencement of the action down to within four years of it; and, if the evidence go no farther, there is no case for the jury.

Per *Patteson* and *Coleridge Js.* On issue upon claim of way in right of occupation of the messuage and land of G., the occupier of a part of the house occupied by G. is not a competent witness to support the affirmative, though his part of the house have no communication with the part which G. occupies. *Parker v. Mitchell*, 788.

PRESUMPTION.

- I. That a court will not decide erroneously, 743. *Prohibition*.
- II. From absence of contradiction, 144. *Certiorari*, I. 1.
- III. Against infancy, 934. *Infant*.
- IV. Of ouster, 1008. *Devise*, II.
- V. Of fraud, 677. *Poor*, V. 3.
- VI. In special case, 842. *Fine*, I.
- VII. See also *Implication*. *Intendment*. *Pleading*.

PRINCIPAL AND AGENT.

Agent.

PRINCIPAL AND DEPUTY.

Evidence, 813. *Marshal*, I.

PRINCIPAL AND SURETY.

Surety.

PRIORITY.

- I. Between judgment creditor and assignee, 859. *Insolvent*, III. 3.
- II. Of writs, 529. 539. *Sheriff*, I. 2. VIII. 1.

PRISONER.

Gaol. *Insolvent*.

PRIVILEGE.

Parliament.

PRIVILEGED COMMUNICATION.

p. 380. *Slander*, I.

PRIVITY.

p. 926. *Auction*.

PROBABLE CAUSE.

p. 98. *Evidence*, 5. 485. *Malicious Prosecution*, II.

PROCESS.

Plea of defect of, 179. *Foreign Judgment*.

PROHIBITION.

By a declaration in prohibition to an ecclesiastical court in the matter of a church rate, plaintiff set forth matter which, as he contended, shewed the rate to be void, as being retrospective and irregularly made; he also set forth the proceedings of the ecclesiastical court, which consisted of a libel, a defensive allegation, and a responsive allegation, the last being received after objection by the now plaintiff in prohibition; and on these, as the plaintiff contended, the matter of objection appeared to be admitted in fact.

Held, that, on plaintiff's shewing, no case was raised for a prohibition at this stage of the proceedings. *Griffin v. Ellis*, 743.

PROMISE.

Consideration, I.

PROMOTIONS.

pp. 1. 757.

PROMISSORY NOTE.

Bills of Exchange.

PROPERTY.

What delivery not a parting with, 888. *Shipping*, I.

PROSECUTION

PROSECUTION.

Malicious, 529. *Malicious Prosecution*, I.

PROPOSAL.

When not an agreement, 418. *Turnpike*, I. 1.

PUBLIC OFFICER.

p. 520. *Partner*, III. 1.

PUBLICATION.

- I. Of poor rate, 38. *Poor*, IV. 2.
- II. Of election of councillors, 512. *Mandamus*, II.
- III. Of parliamentary papers, 297. *Parliament*, III.

PURCHASERS.

Vendors and Purchasers.

QUEEN'S BENCH.

- I. *Practice*.
- II. Power to restrain inferior courts, 194. *Certiorari*, II. 1.

QUI TAM.

Particularity in declaration, 878. *Coals*.

QUO WARRANTO.

- I. When the proper remedy.
Not when office in fact full of the applicant, 512. *Mandamus*, II.
- II. When granted.
Notwithstanding counter objections, 508. *Post*, VI. 1.
- III. When refused.
 1. Because defendant not shown to be in the office, 505. *Affidavit*, I. 1.
 2. Because object too large.

The Court will not grant a quo warranto information against an officer of a corporation established by charter pursuant to stat. 7 W. 4. & 1 Vict. c. 78. s. 49., if it appear that the object in prosecuting such information is to dispute the legality of the charter. *Regina v. Taylor*, 949.

QUO WARRANTO, IV. 1.—4. V. 1, 2

IV. Relator.

1. An inhabitant may be, 508. *Post*, VI. 1.
2. Affidavit as, *Reg. Gen.*, 2. 163 *Post*, VI. 4.
3. Transfer to second, 3. *Post*, V. 2.
4. Collusion, 5. *Post*, V. 2.

V. Practice generally.

1. Time of filing.

Where a rule nisi for a quo warranto information for exercise of a franchise was obtained within six years after the earliest time at which the defendant appeared to have exercised it, but the motion for a rule absolute was not made till the six years had expired, the Court discharged the rule, holding that it was too late, by stat. 33 G. 3. c. 58. s. 1., to file the information. *Regina v. Harris*, 518.

2. Conduct of, when transferred.

Rules nisi for quo warranto informations were obtained against several parties for exercising the office of alderman, on the ground that they had been unduly elected. Pending such rules a Burgess in whose room one of the parties had been elected, moved the Court that, if the rules were made absolute, the management of the prosecutions might be transferred to himself, alleging that he had been improperly displaced, and had contemplated moving for quo warranto informations against the parties elected; that the informations now in question had been moved for collusively by persons of a political party in the borough, adverse to his own, and the same with that of the persons elected; that the relator was in low circumstances and in the employment of the attorney prosecuting the rules; and that the attorney had employed the same agents in *London* to instruct counsel for and against the rules. In answer, it was stated, that the motions were made bona fide and without collusion for the purpose of trying a point of law; that the course complained of had been taken for the purpose of having the question discussed adversely, but at the least possible expence; and that the relator was interested in the affairs of the borough, and had obtained the rules for the sole purpose of having the question

question tried, and not on the request of the attorney, and was liable to him for the costs.

The Court on making the rules absolute for quo warranto informations, directed that the management of the prosecutions should be transferred as prayed: although they were of opinion that the facts did not shew collusion, or a design on the part of the original prosecutors to obtain any undue advantage. *Regina v. Alderson*, 3.

VI. Affidavits.

1. What shew a sufficient intrusion;

An information in the nature of a quo warranto will be granted against a party for claiming to be a councillor of a borough, on affidavit that he has taken upon himself the office, and acted in that capacity, and has been seen present at meetings of the council, acting as a councillor, though the nature of the acceptance or acting be not further specified, and though it be not stated that he has made the declaration under sect. 50 of stat. 5 & 6 W. 4. c. 76.

On motion for such information, the election of the councillor being impeached by objections to his voters, on the grounds of personation, and that some have no title to be on the burgess roll, it is no answer in shewing cause, that, upon defendant's affidavit, enough of the opposite party's voters are bad to reduce his poll below that of the defendant. Though the objections in the latter case be founded on a comparison of the voting papers with the burgess roll, both verified by affidavits, the alleged objections appearing on the face of the voting papers. For the Court will not hold parties disqualified on affidavits which there is no opportunity to contradict.

An inhabitant of a borough may be a relator, on application as above, though he is not a burgess. *Regina v. Quayle*, 508.

2. Effect given to affidavits in reply, 508. *Antè*, 1.

3. Affidavit as relator, *Reg. Gen.*, 2.

4. Statement at whose instance.

Under *R. Mich. 3 Vict.*, the affidavit in support of a motion for a quo warranto information, must state at whose instance the application is made. It

is not enough for a party to depose that, if the court grant the information, it is his intention to become really and bonâ fide the relator. *Regina v. Hedges*, 165.

VII. Costs of defending, 690. *Bond*, II.

RAILWAY.

Inquisition, 194. 202. n. *Certiorari*, II. 1. III.

RATE.

I. Church, 743. *Prohibition*.

II. Poor. *Poor*.

RATIFICATION.

p. 418. *Turnpike*, I. 1. 438. *Consideration*, I. 1. 842. *Fine*, I. 934. *Infant*.

REASONABLE CAUSE.

p. 485. *Malicious Prosecution*, II.

RECEIPT.

In special character, *Dolby v. Isles*, 335.

RECOGNIZANCE.

To prosecute: when no defence, 329. *Malicious Prosecution*, I.

RECORD.

Impeaching, 194. *Certiorari*, II. 1.

RECORDER.

His commission and jurisdiction, 170. *Poor*, XVIII.

RECOVERY.

By adverse action, 966. *Gaming*.

REFUSAL.

To ascertain the truth, 15. *Vestry*, I.

REGISTRATION.

Of births.

Under

Under stat. 6 & 7 *W. 4. c. 86. s. 20.*, the father of a child, if requested by the registrar within forty-two days after the birth, is bound to inform the registrar of the particulars required by the act to be registered, touching the birth. And if he refuse the information on such request, he is indictable for a misdemeanour. *Regina v. Price*, 727.

RELATION.

Of statutes of limitations, 1008. *Devise*, II.

RELATOR.

Quo Warranto, IV.

RELEASE.

By covenant not to sue, 216. *Circuity*, I.

REMAND.

p. 165. *Insolvent*, II.

REMEDY.

Election of, 587. *Assault*, II.

RENT.

Landlord and Tenant.

REPAIR.

I. Of banks *ratione tenuræ*, 69. *Mandamus*, III. 1.

II. *Landlord and Tenant*.

REPLEVIN.

p. 38. *Poor*, IV. 2. 383. *Sewers*, I.

REPLICATION.

I. And new assignment, 411. *Consideration*, I. 1.

II. De injuriâ, what it denies, 665. 675. *Way*, II.

REPUGNANCY.

In pleading, 44. *Pleading*, III. 1.

REPUTED OWNERSHIP.

Bankrupt, IV.

RIGHT OF ENTRY.

REQUEST.

I. When essential to consideration, 438. *Consideration*, I. 2.

II. In pleading, 438. *Consideration*, I. 2.

RESERVATION.

p. 677. *Poor*, V. 3. 759. *Easement*, II.

RESIDENCE.

As apprentice, 52. *Poor*, IX. 1.

RESOLUTION.

Of the House of Commons. *Parliament*.

RESTAMPING.

Stamp.

RETURN.

I. To habeas corpus ad subjiciendum, 273. *Parliament*, II. 2.

II. To certiorari, 73. *Poor*, IV. 1.

III. Of members of banking company, *Bosanquet v. Ransford*, 525. n.

IV. See also *Sheriff. Mandamus*.

REVERSION.

Injury to, 40. *Case*, II. 1.

REVIVAL.

Of consideration, 411. 438. *Consideration*, I.

REVOCATION.

I. Of licence, 34. *Licence*, I.

II. Of assignment of convict, 108. *Transportation*.

REWARD.

On conviction of offender, 855. *Constable*, I.

RIGHT OF ENTRY.

p. 1008. *Devise*, II.

RIVER.

RIVER.

RIVER.

Repair of banks, 69. *Mandamus*, III. 1.

RULE.

I. Enlargement by consent, no waiver, 159. *Certiorari*, I. 2.

II. Motion to rescind, when required, 167. *Plea*, V.

III. Execution by virtue of, 175. *Execution*, VI.

RULES (GENERAL).

I. *Hil. 4 W. 4.* Pleading general issue by statute, 631. *Plea*, II. 2.

II. *Hil. 4 W. 4. 5.* Costs of distinct counts, 906. 913. *Costs*, II.

III. *Hil. 4 W. 4. 20.* Admission of copies, 805. *Evidence*, IV.

IV. *Trin. 1 Vict.* General issue by statute, 193. *Costs*, I.

V. *Hil. 3 Vict.* Forms of writs of ca. sa. *Reg. Gen.* 602.

VI. *Mich. 3 Vict.* Deposition as relator in quo warranto, 2. 163. *Quo Warranto*, VI. 4.

VII. Future practice on motion to set aside plea, 167. *Plea*, V.

SALE.

Licence to remove, 34. *Licence*, I.

SATISFACTION.

I. What not so as to entitle debtor to his discharge, 101. *Insolvent*, III. 1.

II. See also *Accord*.

SCIENTER.

p. 483. *Malicious Prosecution*:

SCIRE FACIAS.

On judgment against public officer, 520. *Partner*, III. 1.

Vol. XI.

SEWERS, I.

1093

SECURITY.

Void, 966. *Gaming*, 1027. *Insolvent*, IV.

SEDUCTION.

I. Cross-examination, 803. *Witness*, II. 1.

II. Impeachment of character, 803. *Witness*, II. 1.

SERVANT.

Master and Servant.

SESSIONS (QUARTER).

I. Grant of to borough, 170. *Poor*, XVIII.

II. Effect of adjournment on equality of votes, 87. *Poor*, XIV. 1.

SETTLEMENT.

Of poor. *Poor*.

SEWERS.

I. Replevin. Cognizance that the owners and occupiers of lands within the lordship of *M.* had immemorially repaired a jetty, which defended the sea coast, in the lordship and parish of *M.*; that, the jetty being out of repair, a court of sewers was holden and a jury impanelled, who presented, finding the prescription as above, and that the owners and occupiers ought forthwith to repair: that notice was given to the owners and occupiers to appear at the next court to plead to the inquisition: that they appeared by *L.*, and pleaded not guilty: that the traverse was tried, and the owners and occupiers found guilty by a jury, who amerced them in 200*l.*, which the commissioners confirmed, and set the amercement on them, and respited the levying thereof, of which they had notice: that, at an adjourned court, it was ordered that, unless the owners and occupiers repaired within fourteen days, the 200*l.* should be levied: that, at a subsequent court, the repairs not being proceeded with, *N.* was appointed to demand and receive the amercement, and afterwards did demand it, but the owners

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and occupiers refused to pay : that, at an adjourned court, the clerk was ordered to give notice that, unless the amercement was paid before a day named, a warrant would be issued to levy it by distress and sale : that such notice was given, but the owners and occupiers did not pay : that, at a subsequent court, a warrant was made by six commissioners, directing persons therein mentioned to levy the 200*l.* by distress and sale of the goods &c., of the owners and occupiers : that plaintiff, at the time of the presentment, and thence to the time when &c., was an owner and occupier : that defendant, by virtue of the warrant, demanded the 200*l.* of him, and, on his refusal, the jetty being still unrepaired, defendant, as a constable mentioned in the warrant, and bailiff of the commissioners, well acknowledged &c.

Held, a good cognizance ; for that, 1. The amercement might be on the owners and occupiers of the lordship generally, yet the levy on the individual.

2. That whether a sale was justifiable or not, the cognizance was good, because it did not shew that a sale had been made in fact, though directed by the warrant. *Ramsay v Nornabell*, 385.

II. Repair of banks, 69. *Mandamus*, III. 1.

SHARES.

p. 205. *Statute*, XII. 1.

SHERIFF.

I. Return.

1. How far binding on sheriff, 253. *Parliament*, I.
2. Nulla bona, when proper.

Plaintiff having issued a *fi. fa.*, the sheriff seized goods, the proceeds of which were exhausted by payment of a year's rent to the landlord under stat. 8 *Ann. c. 14. s. 1.*, the expenses, and a sum due upon another writ of *fi. fa.* previously delivered to the sheriff.

Held, that a return of *nulla bona* to the plaintiff's writ was proper, and that the sheriff, in an action against him

for falsely making such return, might shew the above facts, under a plea that the original defendant had no goods whereof the sheriff could levy the damages in the declaration mentioned *Wintle v. Freeman*, 539.

See also, 529. *Post.* VIII. 1.

II. Levy.

1. What is, 529. 539. *Ante*, I. 2. *Post.* VIII. 1.

2. What is not, 826. *Post.* V.

III. Duty in respect of executions.

1. Notwithstanding order of House of Commons, 253. *Parliament*, I.
2. Notwithstanding committed for contempt in the levy, 253. *Parliament*, I.
3. *Quere* as to vis major, 253. *Parliament*, I.
4. Notwithstanding the pendency of a conflicting rule in another court, 253. *Parliament*, I.
5. Under several writs, 529. 539. *Ante*, I. 2. *Post.* VIII. 1.
6. Landlord's claim for rent, 539. *Ante*, I. 2.
7. On whose license he may discharge prisoner, 829. *Attorney*, II.
8. Notwithstanding vesting order, 859. *Insolvent*, III. 3.

IV. His deputies.

1. Proceedings by when irregular, 194. *Certiorari*, II. 1.
2. Evidence to charge sheriff, 813. *Marshal*, I.
3. In *London*, under 3 & 4 *W. 4. c. 42. s. 20.*, 859. *Insolvent*, III. 3.

V. Poundage.

The sheriff is not entitled to poundage on a *fi. fa.* unless there has been a levy. Accordingly, where, after the sheriff had received the writ, but before execution, defendant, to stop execution, offered the sheriff to pay the money for which the writ issued, and the sheriff refused to receive it without poundage, which defendant paid under protest; the Court, on motion, ordered the sheriff to refund the poundage. *Coles v. Coates*, 826.

VI. Escape, 829. *Attorney*, II. 966. *Gaming*.

VII. Remedies

VII. Remedies against.

1. By rule to pay over proceeds, 253. *Parliament, I.*
2. By attachment, 253. *Parliament, I.*

VIII. Pleading. Defences.

1. Exhaustion of proceeds to satisfy prior writ.

Declaration by execution creditor against sheriff, for falsely returning *nulla bona* to a *fi. fa.*, alleged that the sheriff seized goods of great value, to-wit, of the value of the monies included in the plaintiff's writ, and then levied the same thereout. Plea, that *F.* had sued out a prior writ of *fi. fa.* which was delivered to sheriff before plaintiff's writ, and remained unexecuted in sheriff's hands; and sheriff, after seizing the goods under plaintiff's writ, and before they were sold under the same, seized them under *F.*'s writ, and sold them for the utmost price &c., but for a sum insufficient to pay the sum indorsed on *F.*'s writ, and paid the sum to *F.*

Plea held bad, on special demurrer, as an argumentative traverse of the allegation, that the sheriff had levied the monies indorsed on plaintiff's writ; such levy consisting in a sale, the proceeds of which would be applicable to plaintiff's writ. *Drewe v. Lainson*, 529.

See also 539.

2. Illegality of original debt, 966. *Gaming.*

IX. See also *Writ of Trial*.

SHEW OF HANDS.

p. 15. *Vestry, I.*

SHIPPING.

I. Bill of lading.

M., a planter residing in *Jamaica*, being the owner of sugars, the produce of his estate there, and indebted to defendant, who resided in *London*, for more than their value, shipped them at *Jamaica*, on 4th *April*, on board a ship belonging to defendant, which was in the habit of carrying supplies to *Jamaica*, to the estates of *M.* and others, and taking back consignments from *M.*

and others, and was there employed in that course.

On 4th *April*, the captain signed, and handed to *M.*, a bill of lading, by which the sugars were to be delivered to defendant at *London*, he paying freight.

On 6th *April*, *M.* made an indorsement on the bill that the sugars were to be delivered to defendant only on condition of his giving security for certain payments, but otherwise to plaintiff's agent.

On the same day *M.* indorsed the bill of lading and delivered it to plaintiff, to whom he was indebted in more than the value of the sugars; and the bill was never in defendant's hands.

During *February* and *March M.* had written letters to defendant, advising that the ship would sail with the sugars in question, and others directing him to insure the cargo, and advising him of bills drawn in favour of *B.* on account of the estates producing the sugars in question. And on 4th *April*, *M.* had written to plaintiff desiring him to secure himself for his balance with the produce of those estates.

The sugars arrived in *London*; and defendant paid the bills drawn in favour of *B.*, but did not comply with the conditions of the indorsement made on 6th *April*.

Held, that plaintiff was entitled to the sugars, for that,

(1.) *M.* had not parted with the property by delivering it on board a ship so employed as above stated.

(2.) Nor by accepting the bill of lading, as drawn on 4th *April*, from the captain; *M.* being entitled to change the destination of the sugars till he had delivered them or the bill.

(3.) And that the letters to defendant did not shew an intention to consign the specific property to him.

(4.) That, for these reasons (strengthened by the proof of intention in *M.*'s letter of *April* 4th), the indorsement to plaintiff passed the property. *Mitchel v. Ede*, 888.

II. General ship, 888. *Antè, I.*

SIGNATURE.

I. Evidence of, 322. *Evidence, II. 5.*

4 C 2

II. By

II. By attorney, 144. *Certiorari*, I. 1.

III. 1. In special character. *Dolby v. Iles*, 335.

2. As agent, 926. *Auction*.

IV. Of particular documents.

1. Conviction, 139. *Notice*, III. 2.

2. Coroner's inquisition, 119. *Coroner*, I. 2.

3. Notice of motion for certiorari, 144. *Certiorari*, I. 1.

4. Of bill of lading by captain, 889. *Shipping*, I.

SLANDER.

I. Bona fide charge of felony.

Defendant, in the presence of a third person, not an officer of justice, charged plaintiff with having stolen his property, and afterwards repeated the charge to another person also not an officer of justice, who was called in to search the plaintiff with the consent of the latter.

Held, that the charge was privileged, if the defendant believed in its truth, acted bona fide, and did not make the charge before more persons, or in stronger language, than was necessary; and that it was a question for the jury and not the judge, whether the facts brought the case within this rule. *Padmore v. Lawrence*, 580.

II. General verdict.

Where one of several counts in a declaration for slander was bad, and some of the defamatory words in it were proved at the trial, and the jury found a general verdict, with damages, for the plaintiff, the Court set aside an order of the judge who tried the cause to confine the verdict and damages to one of the good counts, and awarded a venire de novo. *Ennison v. Griffin*, 186.

III. See also *Libel*.

SON ASSAULT DEMESNE.

p. 816. *Pleading*, I.

SPEAKER.

Parliament.

SPECIAL JURY.

p. 913. *Costs*, II. 2.

STAKEHOLDER.

p. 926. *Auction*.

STAMP.

I. Acknowledgment of contract.

Plaintiff in ejectment having adduced oral evidence of the terms of defendant's tenancy under him, defendant put in the following memorandum, signed by himself:—"July 13. 1838. — I acknowledge that I have held the estate," &c., "as tenant to T. F." (the lessor of the plaintiff), "at a yearly rent of 60*l.*, from 4th July 1837, the rent to be paid quarterly; and I further acknowledge to stand indebted to the said T. F. in 60*l.* for the first year's rent, which was due on the 4th July instant. I have, on the signing hereof, paid the attorney of T. F. 6*d.* in part of the rent so due."

Held, that this paper was not a mere acknowledgment or attornment, but a contract or evidence of a contract within stat. 55 G. 3. c. 184. sched. Part I. tit. *Agreement*, and inadmissible without a stamp. *Doe dem. Frankis v. Frankis*, 792.

II. On contract in a deed not incident to the sale.

On surrender of a lease for lives, purporting to be made in consideration of 120*l.* and of a new lease to be granted to the surrenderor for his life, the deed does not require an agreement stamp in addition to the ad valorem stamp; the stipulation for a new lease not being a "matter or thing besides what" is "incident to the sale and conveyance," within stat. 55 G. 3. c. 184. sched. Part I. tit. *Conveyance*. *Doe dem. Phillips v. Phillips*, 796.

III. Restamping, 31. *Bills*, III.

STANNARIES.

Owner of tin-bounds, 677. *Poor*, V. 3.

STATUTE.

STATUTE.

FIRST: Generally.

I. Construction. *Construction.*

II. How modified in practice, 539. *Sheriff*, I. 2.

III. Collateral effect of declaratory act, 920. *Libel*, II.

IV. Compliance, less than literal, 777. *Constable*, III. 1.

V. Forms when imperative, 418. *Turnpike*, I. 1.

VI. What disobedience indictable, 727. *Registration.*

SECONDLY: decisions on public and general statutes.

VII. 27 H. 8. c. 10. (Uses.)

Sec. 1. Legal estate, 188. *Devise*, V. 2.

VIII. 43 Eliz. c. 6. (Costs.) *Costs.*

IX. 13 Car. 2. c. 17. (Bedford level.)

Sec. 5. Authority of conservators, 69. *Mandamus*, III. 1.

X. 16 Car. 2. c. 7. (Gaming.)

Sec. 3. Void securities, 966. *Gaming.*

XI. 22 & 25 C. 2. c. 9. (Proceedings at law.)

Sec. 136. Costs. *Costs.*

XII. 29 C. 2. c. 3. (Frauds.)

1. Sec. 4. Interest in land.

Shares in a joint stock banking company are not goods, wares, or merchandizes within sect. 17 of the Statute of Frauds, 29 Car. 2. c. 3.

In assumpsit for refusing to complete a transfer of such shares sold by defendant to plaintiff, defendant pleaded that the contract was for the sale of an interest in land belonging to the company, and that there was no memorandum in writing, &c., according to the form of the statute. Held, upon a traverse of this plea, that it was not enough for defendant to shew by parol evidence that the company was in the actual possession of real estate, without further proof of the title of the company, and the interest of the shareholders therein.

Quære, whether, supposing the company to be the proprietors of land, such share is an interest in land within sect. 4 of the Statute of Frauds? *Humble v. Mitchell*, 205.

2. Sec. 4. Person to whom the promise is made, 438. *Consideration*, I. 2.

5. Sec. 4. Available under G. I., 441. *Consideration.*

4. Sec. 17. Sale of goods, 205. *Antè*, I.

5. Sec. 17. Evidence that one of the parties acted only as agent, 589. *Agent*, III.

6. Sec. 17. Parol evidence of custom to explain the contract, 549. *Custom*, I. 2. 589. *Agent*, III.

7. Sec. 17. Contract in bought and sold notes, 589. *Agent*, III.

XIII. 5 & 6 W. & M. c. 11. (Poor.)

1. Sec. 3. Costs, 143. *Certiorari*, IV. 3.

2. Sec. 3. Settlement by apprenticeship, 52. *Poor*, IX. 1.

XIV. 8 Ann. c. 14. (Rents.)

Sec. 1. Landlord's claim for rent, 539. *Sheriff*, I. 2.

XV. 9 Ann. c. 14. (Gaming.)

Sec. 1. Void securities, 966. *Gaming.*

XVI. 11 G. 1. c. 18. (London.)

p. 819. *London*, I.

XVII. 11 G. 2. c. 19. (Landlord and Tenant.)

1. Sec. 14. Meaning of the word "landlord." *Dolby v. Iles*, 335.

2. Sec. 21. Plea of not Guilty "by Statute," 643. *Plea*, II. 3.

XVIII. 13 G. 2. c. 18. (Certiorari.) *Certiorari.*

XIX. 17 G. 2. c. 3. (Poor rates.)

Sec. 1. Publication, 38. *Poor*, IV. 2.

XX. 24 G. 2. c. 44. (Constables.)

Sec. 6. Justification under warrant, 777. *Constable*, III. 1. 993. *Land tax.*

XXI. 24 G. 2. c. 55. (Warrants.)

Sec. 1. Indorsing, 777. *Constable*, III. 1.

XXII. 14 G. 3. c. 78. (Building Act.)

Sec. 41. Whether landlord or tenant liable to contribution, 645. *Executor*, I.

- XXIII.** 20 G. 3. c. 17. (Land tax.)
Sec. 3. P. 993. *Land tax.*
- XXIV.** 22 G. 3. c. 83. (Poor.)
Appointment of officers of union, 558.
Poor, I. 1.
- XXV.** 32 G. 3. c. 58. (Quo warranto.)
Sec. 1. Limitation of time, 518. *Quo warranto*, V. 1.
- XXVI.** 32 G. 3. c. 60. (Libel.)
Sec. 1. Judge's direction, 920. *Libel*, II.
- XXVII.** 38 G. 3. c. 5. (Land tax.)
Secs. 8. 17. Distress, 995. *Land tax.*
- XXVIII.** 49 G. 3. c. 68. (Bastardy.)
Sec. 5. Committal, 777. *Constable*, III. 1.
- XXIX.** 55 G. 3. c. 184. (Stamps.)
Stamp.
- XXX.** 56 G. 3. c. 100. (Habeas Corpus.)
Secs. 1. 3. 4. What not inquirable on affidavit, 273. *Parliament*, II. 2.
- XXXI.** 56 G. 3. c. 159. (Parish apprentices.) *Poor.*
- XXXII.** 3 G. 4. c. 126. (Turnpikes.)
Secs. 82. and 148. and Sch. No. XIV. Agreement to subscribe, 418. *Turnpike*, I. 1.
- XXXIII.** 4 G. 4. c. 95. (Turnpikes.)
Sec. 68. Liability of parish to apportionment, 543. *Turnpike*, II.
- XXXIV.** 5 G. 4. c. 85. (Gaols.)
Sec. 1. Contract with borough, 144. *Certiorari*, I. 1.
- XXXV.** 6 G. 4. c. 16. (Bankrupts.)
Secs. 18. 127. 135. *Bankrupt.*
- XXXVI.** 7 G. 4. c. 46. (Banking companies.)
Secs. 9. 12. 13. Executors, 520. *Partner*, III. 1.
- XXXVII.** 7 G. 4. c. 57. (Insolvent.)
Sec. 61. New security, 1027. *Insolvent*, IV.
- XXXVIII.** 7 & 8 G. 4. c. 30. (Injuries to property.)
Sec. 6. Felonious obstruction of mines, 493. *Malicious Prosecution*, II.
- XXXIX.** 9 G. 4. c. 14. (Written memorandum.)
Sec. 5. Ratification, 934. *Infant.*
- XL.** 9 G. 4. c. 40. (Pauper lunatics.)
Secs. 38. 54. 60. Jurisdiction on appeal, 170. *Poor*, XVIII.
- XLI.** 9 G. 4. c. 61. (Licensed victuallers.)
Secs. 21. 27. 29. Notice of appeal, 139. *Notice*, III. 2.
- XLII.** 9 G. 4. c. 77. (Turnpikes.)
Secs. 6, 7. Agreement to subscribe, 418. *Turnpike*, I. 1.
- XLIII.** 9 G. 4. c. 83. (*New South Wales*.)
Sec. 9. Revocation of assignment of convicts, 108. *Transportation.*
- XLIV.** 1 & 2 W. 4. c. 60. (Vestries.)
Sec. 14. Election of inspectors, 15. *Vestry*, I.
- XLV.** 2 & 3 W. 4. c. 71. (Prescription.)
Secs. 2, 3, 4. *Prescription. Water-course.*
- XLVI.** 3 & 4 W. 4. c. 27. (Limitations.)
1. Secs. 2. 12. 15. Tenants in common, 1008. *Devise*, II.
2. Secs. 2. 14. 15. Adverse possession, 44. *Pleading*, III. 1.
- XLVII.** 3 & 4 W. 4. c. 42. (Amendment of the law.)
1. Sec. 17. p. 941. *Writ of trial.*
2. Sec. 20. Sheriffs' deputy in London, 859. *Insolvent*, III. 3.
- XLVIII.** 4 & 5 W. 4. c. 76. (Poor.)
1. Sec. 46. Appointment of officers, 558. *Poor*, I. 1.
2. Sec. 81. Sufficiency of examinations &c. *Poor*, XIII. XIV.
- XLIX.** 5 & 6 W. 4. c. 20. (Revenue.)
Sec. 19. Defence, 993. *Land-tax.*
- L.** 5 & 6 W. 4. c. 50. (Highways.)
Secs. 47. 103. Notice of appeal, 154. *Notice*, III. 1.
- LI.** 5 & 6 W. 4. c. 76. (Municipal corporations.)
1. Sec. 25. Election of mayor and aldermen.
In corporations governed by stat. 5 & 6 W. 4. c. 76., the election of mayor on November 9th must precede that of aldermen.
A prior election of aldermen, whether at the quarterly meeting holden according to sect. 69, or at an earlier meeting on the same day, is void.

Stat. 5 & 6 W. 4. c. 76. s. 25. does not prevent the outgoing aldermen from voting in the election of mayor, although the candidate for whom they vote be an alderman : and the party elected may be an outgoing alderman.

An outgoing alderman, elected mayor, and afterwards presiding at the election of aldermen, may at such elections, under stat. 7 W. 4. and 1 Vict. c. 78. s. 14., give a casting vote, but not an original vote ; for the mayor's right to vote in the first instance, under stat. 5 & 6 W. 4. c. 76. s. 69., is restricted by sect. 25 of the same act, when the mayor is an outgoing alderman. *Regina v. M'Gowan*, 869.

2. Sec. 35. Publication of election, 512. *Mandamus*, II.

3. Secs. 50, 51. Acceptance of office, 505. *Affidavit*, I. 1. 508. *Quo Warranto*, VI. 1. 512. *Mandamus*, II.

4. Sec. 66. Compensation.

Before stat. 5 & 6 W. 4. c. 76., a person had acted as clerk to the justices of a corporation ; he had received no formal appointment from the corporation, but the governing body had ordered that he should have a fixed salary from the corporation funds, besides his perquisites. The office was not named in the charter. He was displaced by the justices appointed under the act.

Held, that he was entitled to compensation under sect. 66 ; and, the corporation having refused to give any compensation, and the Lords of the Treasury, upon appeal, having ordered one, this Court granted a mandamus requiring the corporation to give a bond for the amount. *Regina v. Carmarthen, Mayor &c.*, 9.

5. Sec. 66. Admission by omitting to determine.

Where a borough officer, dismissed under stat. 5 & 6 W. 4. c. 76., applied to the town council for compensation, and they did not, within six calendar months, determine on the claim, the Court made a rule absolute for a mandamus to them to execute a compensation bond ; although they alleged, against the rule, that the statement of profits, delivered in by the applicant under sect. 66, did not shew the yearly amounts for five years next before the

passing of the act, but only a yearly average down to the end of 1834 ; and that the applicant had had another person joined with him in the office, who, at the time of the motion for a mandamus, had made no claim ; for

These objections, though they might have been an answer to the claim, did not render it a nullity ; and the council, not having urged them within the six months, were concluded by the first proviso of sect. 66. *Regina v. Swansea, Mayor &c.*, 66.

6. Sec. 69. Casting vote, 869. *Antè*, 1.

7. Sec. 92. Liability for lawful debts, 470. *Bond*, II.

8. Sec. 105. Jurisdiction of recorder, 170. *Poor*, XVIII.

9. Sec. 114. Contract for maintenance of prisoners, 144. *Certiorari*, I. 1.

10. Sec. 132. *Certiorari*, 144. *Certiorari*, I. 1.

LII. 6 & 7 W. 4. c. 86. (Registration.)

Sec. 20. What refusal indictable, 727. *Registration*.

LIII. 6 & 7 W. 4. c. 96. (Parochial assessment.)

Sec. 2. Rate when void, 73. *Poor*, IV. 1.

LIV. 7 W. 4. & 1 Vict. c. 78. (Municipal corporations.)

1. Sec. 14. Election of aldermen, 869. *Antè*, LI. 1.

2. Sec. 49. New charters, 949. *Quo Warranto*, III. 2.

3. Sec. 49. Effect of charter, 144. *Certiorari*, I. 1.

LV. 3 & 4 Vict. c. 9. (Parliamentary papers.)

Sec. 1. Stay of proceedings, 273. *Parliament*, II. 2.

LVI. 1 & 2 Vict. c. 110. (Insolvents.)

1. Sec. 18. Execution by virtue of a rule of Court, 175. *Execution*, VI.

2. Secs. 36, 37. Proof of vesting order, 98. *Evidence*, V.

3. Secs. 36, 37. Effect of subsequent tender, 101. *Insolvent*, III.

4. Sec. 37. Effect of vesting order, 859. *Insolvent*, III. 3.

5. Sec. 85. Charge in custody, 165. *Insolvent*, II.

1100 STATUTE, LVII—LXIV.

THIRDLY: local acts.

LVII. *Avon* navigation, 463. *Poor*, V. 2.

LVIII. *Bedford Level* acts, 69. *Mandamus*, III. 1.

LIX. *Bristol and Exeter* Railway, 202. n. *Certiorari*, III.

LX. *Great Chell* and *Shelton* turnpike road, 418. *Turnpike*, I. 1.

LXI. *Lancaster* canal, 225. *Canal*, IV.

LXII. *London* coalvenders, 838. *Coals*.

LXIII. *Sheffield, Ashton-under-Lyne*, and *Manchester* railway, 194. *Certiorari*, II. 1.

LXIV. *Worcester* Judges lodgings, 57. *Poor*, VI. 1.

STAY OF PROCEEDINGS.

On speaker's certificate, 297. *Parliament*, III.

STRANGER.

Title in, 44. *Pleading*, III. 1.

STRIKING OUT COUNTS.

P. 906. 913. *Costs*, II.

SUBSCRIPTION.

How far conditional on whole sum being raised, 418. *Turnpike*, I. 1.

SUGGESTION.

When insufficient, 520. *Partner*, III. 1.

SUNDAY.

Expiration of municipal office on, 869. 873. *Statute*, LI. 1.

SUPERSEDEAS.

Of order of removal, 609. *Poor*, XVI.

SURETY.

Nature of instrument, 215. *Bills*, I. 1.

SURPLUSAGE.

I. In statute, 350. *Bankrupt*, V.

II. In Lord Chancellor's order, 373. *Bankrupt*, I.

TIME, I.—IV.

III. Rejection of, 720. *Landlord and Tenant*, X. 1.

SURRENDER.

Stamps, 796. *Stamp*, II.

TENANT.

How late let in to defend, 353. *Ejectment*, IV. 1.

TENANT IN COMMON.

Ouster and adverse possession, 1008. *De-vise*, II.

TENDER.

I. Case for refusing, 98. *Evidence*, V.

II. When it does not entitle to discharge, 98. *Evidence*, V.

III. To constable, 777. *Constable*, III. 1.

TERM.

I. Merger, 842. *Fine*, I.

II. 1. Forfeiture, by feoffment and fine, 842. *Fine*, I.

2. Election to treat it as not forfeited, 842. *Fine*, I.

III. Recovery in ejectment upon, 842. *Fine*, I.

IV. When it does not pass under a devise of the fee, 842. *Fine*, I.

V. Assent of executor to bequest of, 842. *Fine*, I.

TIME.

I. Generally.

1. Meaning of from time to time, 108. *Transportation*.

2. Allegation of, 119. *Coroner*, I. 2.

3. Statutory substitution of *Monday* for *Sunday*, 869. 873. *Statute*, LI. 1.

II. Of executing counterpart, 403. *Pleading*, III. 4.

III. In pleading. *Pleading*.

IV. Of filing information, 518. *Quo warranto*, V. 1.

V. In

V. In notice to determine tenancy, 720. *Landlord and Tenant*, X. 1.

VI. In examinations, 616. *Poor*, XIII. 3.

VII. Priority between proceedings on the same day, 859. *Insolvent*, III. 3.

VIII. Lapse of.

1. When no answer to rule for mandamus, 15. *Vestry*, I.

2. When an answer, 316. *Mandamus*, III. 2.

3. Limitation in road acts, 418. *Turnpike*, I. 1.

4. Prescription, 688. 788. *Prescription*, I. II.

5. Expiration of office by, 869. *Statute*, LI. 1.

6. As evidence of ouster, 1008. *Devise*, II.

7. See also *Adverse possession*.

IX. For taking objections.

1. At trial, 28. *Covenant*, III. 1. 571. *Watercourse*.

2. In compensation cases, 66. *Statute*, LI. 5.

3. To description of documents brought up by certiorari, 73. *Poor*, IV. 1.

4. To jurisdiction on summons, 913. *Costs*, II. 2.

5. Of tendering bill of exceptions, 1008. *Devise*, II.

TIN MINES.

Page 677. *Poor*, V. 3.

TITLE.

I. Nature.

1. Prescriptive, 688. *Prescription*, I.

2. By adverse possession, 1008. *Devise*, II.

3. By estoppel, 307. *Mortgage*, I.

4. By assessment of statutory compensation, 463. *Poor*, V. 2.

II. With respect to form of action.

1. To support ejectment, 842. *Fine*, I.

2. For use and occupation, 335. *Landlord and Tenant*, IX. 2.

III. Pleading, 44. *Pleading*, III. 1.

TOLLS.

Tin, 677. *Poor*, V. 3.

TRANSPORTATION.

Under stat. 9 G. 4. c. 83. s. 9., the governors of *New South Wales* and *Van Diemen's Land* have power to revoke assignments of convicts, without any remission of their sentences. *Bryan v. Arthur*, 108.

TRAVERSE.

I. Of return, 955. *Mandamus*, IV. 2.

II. *Pleading*, XI.

TREASURY.

Lords of the, 9. *Statute*, LI. 4.

TRESPASS.

I. Under licence to remove goods, 34. *Licence*, I.

II. Though there is a remedy by appeal, 993. *Land-tax*.

III. Joinder of defendants, 993. *Land-tax*.

IV. Accord, 453. *Accord*.

V. Adverse possession, 44. *Pleading*, III. 1.

VI. *Pleading*.

1. G. I. by statute, 193. *Costs*, I.

2. New assignment, 665. *Way*, II.

VII. *Costs*.

When not taken away, 193. *Costs*, I.

TRIAL.

I. Points to be made at. *Magor v. Chadwick*, 571.

II. Limited to issues properly raised, 665. *Way*, II.

TRUSTEE.

I. Devise to, 188. *Devise*, V. 2.

II. Payee of note as, 661. *Pleading*, XI. 1.

TURNPIKE.

TURNPIKE.

I. Agreement to subscribe.

The General Turnpike Act, 9 G. 4. c. 77. (sects. 6, 7) does not repeal the directions of stat. 3 G. 4. c. 126. sects. 82, 148, and sched. No. XIV., as to the form of agreement to subscribe money for making and repairing a road.

Under the latter act, such agreement must be in writing; and an instrument in the following form, drawn up at a meeting of trustees, and sent forth for subscription, will not warrant them in making calls upon a party signing it. "At a meeting" &c. "it appearing from the estimates" "that, to effect the object," &c., "namely, the new line from" *A.* to *L.*, "and the diversion" &c., "an expense of 4600*l.* will be involved," *it was proposed* that the necessary application should be made without delay, in order to raise funds to meet the expenses referred to, and the gentlemen under named *have proposed* to subscribe such sums for the purpose as are set opposite to their respective names, and which *it is proposed* to secure" "by way of mortgage on the tolls." If the agreement be not such as the acts require, an action for calls cannot be supported by the party's acknowledgment, after the works have been commenced under the act, that he is liable as having signed.

Assuming that the writing was a proper agreement, quære whether it would be a defence, that before the act passed the trustees (with the defendant's knowledge) altered the proposed line. And whether such defence ought to be specially pleaded. Also, whether it would be a defence that after the act passed (and before the above acknowledgment) the diversion was given up.

A local turnpike act (3 & 4 W. 4. c. liv.) empowered the trustees to take lands, making compensation, but enacted that the powers so given should cease if the trustees should not within three years agree and pay for the lands required for the purposes of the act, or so much thereof as they should deem necessary or proper. In an action for calls under this statute, quære, whether

VALUE.

it was a good plea, that the trustees did not, within three years, agree or pay for the lands required for the purposes of the act (specifying the purposes), or so much of the said lands as the said trustees deemed necessary or proper. *Meigh v. Clinton*, 418.

2. Action for calls, 418. *Antè*, 1.

3. Diversion, 418. *Antè*, 1.

4. Pleading, 418. *Antè*, 1.

5. Limitation of time, 418. *Antè*, 1.

II. Liability to repair.

Stat. 4 G. 4. c. 95. s. 68., which provides for apportioning the liability to repair turnpike roads that have been diverted, is not confined to bodies politic or corporate and individuals, but applies also to parishes. *Regina v. Barton*, 345.

UNDERLETTING.

Insolvency of undertenant, 645. *Executor*, 1.

UNION.

p. 558. *Poor*, I. 1.

USE AND OCCUPATION.

p. 335. *Landlord and Tenant*, IX. 2.

USER.

I. To support prescription, 688. 788. *Prescription*, I. II. 571. *Watercourse*.

II. As evidence of occupation, 463. *Poor*, V. 2.

III. As ground for quo warranto, 505. *Affidavit*, I. 1. 508. *Quo warranto*, VI. 1.

IV. Non-user of custom, 819. *London*, I.

USES.

Statute of.

Vesting of legal estate, 188. *Devise*, V. 2.

VALUE.

Less than rent, 645. *Executor*, I.

VARIATION.

VARIATION.

VARIATION.

From style of partnership, 339. *Bills*, II.

VENDORS.

- I. Interest in land.
 1. Onus of proof, 205. *Statute*, XII. 1.
 2. Sale by auction, 926. *Auction*.
- II. Conveyance. *Conveyance*.
- III. Goods, wares, and merchandizes.
 1. What not, within Statute of Frauds, 205. *Statute*, XII. 1.
 2. In market overt, 326. *Market overt*.
 3. By factor in his own name, 549. *Custom*, 589. *Agent*, III.
 4. Evidence of identity of parties, 589. *Agent*, III.
 5. Bought and sold notes, 589. *Agent*, III.

VENIRE DE NOVO.

After general verdict, 186. *Slander*, II.

VENUE.

p. 128. n. *Coroner*, I. 1.

VERDICT.

- I. General. 179. *Foreign Judgment*. 186. *Slander*, II. 28. *Covenant*, III. 1.
- II. Amending entry, 179. *Foreign Judgment*. 186. *Slander*, II.
- III. As evidence of title, 463. *Poor*, V. 2.
- IV. As to existence of customs, 819. *London*, I.
- V. In special terms, 819. *London*, I.

VESTING ORDER.

Insolvent.

VESTRY.

- I. Select.

Election under 1 & 2 W. 4. c. 60.

On the nomination of the eight inspectors to act in the election of vestrymen under stat. 1 & 2 W. 4. c. 60.,

VISITOR.

1103

the decision of the chairman, on a shew of hands, that one or the other party has a majority, is not conclusive, but he is bound, on requisition from either side, to take steps for ascertaining the numbers.

Quære, whether the proper course, on such requisition, be to divide the meeting or at once to take a poll. Semble, that under stat. 1 & 2 W. 4. c. 60. s. 14. a division is proper.

The mere existence of party feeling in the chairman is not sufficient ground for impeaching a nomination of inspectors under the statute; but if, after improperly refusing to ascertain the numbers voting, he has declared certain persons to be the inspectors nominated by the meeting, and the election of vestrymen has thereupon taken place, the Court will grant a mandamus for a new election, although a considerable time has elapsed. *Ex. gr.*: Where the election took place, May 6th, and a mandamus was moved for on June 6th, and cause was shewn November 4th, the rule was made absolute, November 21st.

If four inspectors have been improperly declared to be nominated by the meeting, such mandamus will be granted, although the other four inspectors were duly nominated by the churchwardens, and officiated at the election. *Regina, v. St. Pancras Vestrymen, &c.*, 15.

- II. Powers of chairman, 15. *Ante*, I.
- III. Direction of mandamus to, *Regina v. St. Pancras Vestrymen, &c.*, 27. n.

VICTUALLER.

Notice of appeal by, 139. *Notice*, III. 2.

VIDELICET.

In pleading, 44. *Pleading*, III. 1.

VIS MAJOR.

p. 253. *Parliament*, I.

VISITOR.

Of union, 558. *Poor*, I. 1.

VOID

VOID SECURITY.

- p. 966. *Gaming*. 1027. *Insolvent*, IV.
982. *Duress*, I.

VOLUNTEER.

- p. 438. *Consideration*, I. 2.

VOTE.

- I. Mode of voting, 15. *Vestry*, I.
II. Casting, 869. *Statute*, LI. 1.
III. Voting paper, 508. *Quo Warranto*, VI. 1.

WAGES.

- p. 411. *Consideration*, I. 1. 798. *Master*, V.

WAIVER.

- I. Of forfeiture, 411. *Consideration*, I. 1. 842. *Fine*, I.
II. Of perusal of original warrant, 777. *Constable*, III. 1.
III. Not by consenting to enlargement of rule, 159. *Certiorari*, I. 2.
IV. By not objecting to jurisdiction on summons, 915. *Costs*, II. 2. 941. *Writ of Trial*.

WAREHOUSE.

In *London*, 326. *Market Overt*.

WARRANT

- I. Practice.
1. Suspension of, 777. *Constable*, III. 1.
2. Indorsing, 777. *Constable*, III. 1.
3. Tender of money under, 777. *Constable*, III. 1.
4. Perusal and copy, 777. *Constable*, III. 1. 993. *Land-tax*.
II. Form.
1. General, 273. *Parliament*, II. 2.
2. Shewing authority, 273. *Parliament*, II. 2.
3. Certainty, 273. *Parliament*, II. 2. 993. *Land tax*.

WAY, I.—III. 1.

4. Participial allegation, 273. *Parliament*, II. 2.
5. Directing distress and sale, where the power of sale is questionable, 393. *Sewers*, I.

III. Objections to, 777. *Constable*, III. 1.

WATERCOURSE.

Artificial.

In the absence of a special custom, artificial watercourses are not distinguished in law from natural ones; and a title may be gained by twenty years user, as well to the former as the latter. Therefore, where mine-owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing: Held, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it.

Quere, whether a universal practice in the neighbourhood to resume the use of such adit waters, for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby raising the inference, that the party claiming used the water, not of right, but only during the accidental disuse of the adit, and with knowledge that the mine-owners reserved to themselves a power to recommence working, and thereby disturbing the waters. *Magor v. Chadwick*, 571.

WAY.

- I. Construction of grant, 759. *Easement*, II.
II. Effect of alteration in tenement, 759. *Easement*, II.
III. Pleading and evidence.

1. Effect of new assignment.

To a declaration in trespass *quare clausum fregit*, defendant pleaded a right of way in the close in which &c.; plaintiff new assigned extra the way in the plea mentioned, to which defendant pleaded that plaintiff obstructed the

the way in the plea mentioned, wherefore defendant deviated; plaintiff replied *De injuria*.

Held that, on this record, plaintiff was entitled to apply the evidence to a way across the close which he admitted, and which had not been obstructed; and that defendant could not prove his case by shewing that another way which he claimed across the close, which was disputed by plaintiff, had been obstructed.

A judge should not, even by consent of parties, allow an issue to be tried which the record does not properly raise, unless the parties will amend the pleadings. *Per Patteson J. at Nisi Prius, 665. Ellison v. Isles, 665.*

2. Competency, 788. *Prescription, II.*

WIFE.

Baron and Feme.

WILL.

Devise.

WITNESS.

I. Interest.

1. Occupier of part of messuage in respect of which &c., 788. *Prescription, II.*

2. Second mortgagee.

In ejectment brought by an assignee of a mortgage, made by the defendant, a party who has taken a later mortgage from defendant is not a competent witness for the defence. *Doe dem. Cuthbert v. Bamford, 786.*

II. Cross-examination.

1. Laying ground for contradiction.

The general rule is, that, if a party to a cause wishes, on the trial, to impeach an adverse witness by proof of his having used certain expressions, the witness himself must first be asked whether he used them.

Semble, that, where the witness's moral character is relevant to the issue, such expressions may be proved without the previous inquiry, if they tend merely to disgrace the witness by shewing that he has made unbecoming declarations. But,

Held that, even if they be of such a nature, the introductory question must

not be dispensed with if they tend likewise to contradict some part of the witness's evidence. Therefore, in an action against *A.* for seducing and getting with child the plaintiff's daughter, which facts the daughter proves, the defendant cannot give evidence that she has talked of *B.* as her seducer and father of her child, unless she be first asked in cross-examination whether she ever used those expressions. *Carpenter v. Wall, 805.*

2. As to handwriting by comparison, 522. *Evidence, II. 5.*

III. Discrediting.

1. By contradiction, 805. *Ante, II. 1.*
2. Impeaching character, 805. *Ante, II. 1.*

IV. Depositions, when evidence, 807. *Evidence, III. 3.*

WRIT.

- I. Direction. *Regina v. St. Pancras, Vestrymen, &c., 27. n.*

- II. Priority, 529. 539. *Sheriff, I. 2. VIII. 1.*

WRIT OF RIGHT.

Judgment when not a final bar.

If tenant in a writ of right obtain judgment on demurrer to the count, the demandant not joining in demurrer, but making default, the judgment for the tenant ought not to be final, no issue being joined on the mise. A judgment, under such circumstances, barring the demandant as to the present action, is, so far, good; but, if it also adjudge that the tenant shall hold to him and his heirs quit of the demandant and his heirs for ever, that part is erroneous, and the judgment ought, so far, to be reversed.

So held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench. *Nesbit v. Rishton, 244.*

WRIT OF TRIAL.

Declaration in assumpsit stated that, in consideration that defendant was tenant of a farm to plaintiff, he promised to spend on the farm all the hay which

which should arise during the tenancy : breach, that a certain quantity of hay arose, but defendant spent it elsewhere. Pleas, 1. Non assumpsit : 2. That the hay was not spent elsewhere. The writ of summons was indorsed for 8*l.* 8*s.* 4*d.* debt. Held, not to be triable before the sheriff, under stat. 3 & 4 *W.* 4. c. 42. s. 17.

And, a verdict having been recovered before the sheriff for 5*l.* 14*s.* 2*d.*, the Court set aside the writ of trial and subsequent proceedings, although it was suggested that defendant had assented to the trial being had before the sheriff.

WRONG-DOER.

But the Court, considering that the defendant had been a party to the proceedings, gave no costs. *Lawrence v. Wilcock*, 941.

WRITING.

When it cannot be dispensed with, 418. *Turnpike*, I. 1.

WRONG-DOER.

When person entitled becomes one after adverse possession, 44. *Pleading*, III. 1.



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